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# MILITARY LAW MADE EASY

By

Lieut.-Col. S. T. BANNING, C.B.E.  
*p.s.c.*, LL.B. (Lond.), B.A., LL.D.

THIRTEENTH EDITION

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# MILITARY LAW MADE EASY

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**1924**

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## PREFACE TO THE FIRST EDITION.

THE publication of a fresh work on Military Law appears to demand a few words of explanation, if not of apology, for its appearance, as there are so many treatises on this subject, of varying merits, already before the public. This volume is intended to form one of GALE & POLDEN'S "MILITARY SERIES," and is specially prepared to assist Officers reading for the Promotion Examination ; the subject has, therefore, been dealt with entirely from that point of view, and closely follows the Syllabus laid down in Queen's Regulations, Appendix VII. All Officers should consult the official books in preparing for this Examination, since it is these—"The Manual of Military Law" and the "Queen's Regulations"—which they will be allowed to use in answering the first paper ; hence it becomes of vital importance that they should "know their way about" them, and be able to quickly "quote chapter and verse" for their statements. An experience of over ten years as an Instructor in Military Law has, however, convinced me that these official volumes are rather confusing to a student getting up the work, more especially if he is working alone, and perhaps, as in the case of Officers of the Auxiliary Forces, with little previous knowledge of the subject. It is with a view, therefore, of presenting a systematic account of that portion of Military Law necessary for the Examination that this book has been written. \*The Papers set at the last three Examinations have been added, fully answered, with references to the official books. Students will do well to verify these references, not only to test the accuracy of the answers given, but to train themselves in the knowledge of what part of our Military Code deals with any particular point. \*The questions at the end of the Chapters have been taken from the Papers set at the R.M.C. from July, 1895, to December, 1900.

S. T. B.

R.M.C., *March*, 1901.

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\* These have been omitted, owing to the increased size of the book.



## PREFACE TO THE THIRTEENTH EDITION.

---

SINCE the last edition of this book was published three years ago, several important amendments in the law have been made by the Annual Army Acts, involving corresponding amendments in the Rules of Procedure, and new editions of the Royal Warrant for Pay and Promotion and of the King's Regulations have been issued, necessitating a complete revision of all the references to these publications. The opportunity has been taken to insert much fresh matter to increase the usefulness of the book to those who use it in the daily administration of military law. The Appendices of Examination Papers with the Answers have been omitted, as the Papers with the Examiner's Notes and Answers to the Questions are now given in the Reports of the Examinations, published by the War Office.

S. T. B.

LONDON,  
*December, 1923.*



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**PART I**

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**LIEUTENANTS, FOR PROMOTION TO  
CAPTAIN**





# MILITARY LAW

## MADE EASY

### CHAPTER I

#### INTRODUCTORY

**MILITARY** Law is the law which governs Officers and soldiers in peace and war, at home and abroad. It is contained partly in Acts of Parliament and partly in Regulations, framed under the authority of the Statute Law, as will be explained in the next Chapter.

**Man., I, 3.**

As distinguished from the ordinary civil law, it is the law relating to, and administered by, Military Courts, and is chiefly concerned with the trial and punishment of offences against its enactments committed by Officers and soldiers. It must always be remembered that a British subject, by becoming an Officer or soldier, does not remove himself outside the pale of the ordinary law of the Realm, to which he remains in every way amenable, except in so far as he is specially exempted ; but in addition to his ordinary liabilities as a citizen he is also governed by laws which do not affect civilians.

**ss. 41 proviso, 162 (2) ; Man., II, 1 ;  
Dicey, pp. 297, 298.**

The object of Military Law is to maintain discipline among the troops and those who accompany an army on active service. With this object, offences which in civil life would be punished by a small fine, *e.g.*, assault, or would be merely breaches of contract, *e.g.*, desertion or neglecting to obey orders, are in the Army dealt with as crimes, and render an offender liable to heavy penalties.

**Man., II, 2.**

**B**

But in addition to disciplinary matters, the Army Act is concerned also with administrative law, as for example the law regulating recruiting and billeting. This part of the Act affects civilians as well as soldiers, and breaches of it render them liable to be dealt with by the Civil Courts.

**ss. 96—99, 102—110 ; Man., II, 1.**

Martial Law must be carefully distinguished from Military Law. The object and scope of the latter are as just defined, and its provisions are clearly laid down in the Military Code. Martial Law, on the other hand, is in reality no law at all, and strictly speaking is not recognized by English jurisprudence. As used in the preamble of the Army Annual Act it is now synonymous with Military Law. It is, however, sometimes used in two different senses—(a) in connexion with riots and insurrections ; (b) in connexion with the government of an occupied territory by the Commander of an invading army.

In the former sense it must be understood merely to mean that military force will be used against the rioters to reduce them to subjection ; but in contemplation of the law these rioters always remain subject to the ordinary law of the Realm, as do the troops employed in quelling the riot, whose rights and liabilities in the performance of this duty differ in no respect from those of ordinary citizens. This subject is dealt with more fully in Chapter XXII.

**Man., I, 4, 15 ; Dicey, pp. 283—287.**

In the latter sense it forms part of what are known as the “Customs of War,” which are dealt with at length in Chapter XIX. By these customs, for the most part tacitly, or in some cases explicitly, agreed on between civilized nations, the Commander of an army in occupation of a foreign country governs his own troops by the Military Law of his country, while he imposes such laws and regulations on the inhabitants as he deems necessary for the security of his forces and the maintenance of good order among the

population. It is in this sense that Martial Law has been described as "the will of the Commander."

**Man., I, 5, 6 ; XIV, 340—404 ; Hall, sec. 156.**

The supreme command of all forces by sea and land is the undoubted right of His Majesty.

**13 Chas. II, st. 1, c. 6.**

Since the institution of the Standing Army in 1660, the Sovereign has delegated his powers of command to an Officer variously designated "Captain-General," "General Commanding-in-Chief," "Commander-in-Chief," etc., until 1904, when by Letters Patent, dated 6th February, 1904, the Army Council was constituted, and all the Sovereign's prerogative powers of command and administration of the Army were transferred to them.

**W.O.L., pp. 7, 14, 25.**

The present constitution and distribution of the duties of the Army Council are defined by an Order in Council of 13th October, 1922.

**K.R., App. I.**

His Majesty has both prerogative and statutory powers to make regulations as to the persons to be appointed Officers in the Army, and as to the manner in which command is to be exercised ; provided that no one can be given command over a person *superior* in rank to himself. It has been ruled that an Officer *senior in the same rank* is not of "superior rank" within the meaning of this section. **s. 71.** The persons to whom commissions in the Regular Army may be granted are detailed in the Royal Warrant for Pay and Promotion.

**R.W., 24—45.**

Detailed regulations as to the command, rank, and precedence of Officers of the Regular Forces, Militia, Territorial Army, etc., are laid down by a Royal Warrant of 1st April, 1910, as amended by a later one dated 13th July, 1911.

**K.R., 174.**

Command is always to be exercised by the senior combatant Officer present, irrespective of the branch of the Service to which he belongs, and including the Royal Marines and Indian Forces. Officers with

permanent rank take precedence of those with temporary rank. A Medical, or Departmental, Officer, or a Quarter Master is not entitled to command, except over those specially placed under his orders ; or, in the case of a Medical Officer, patients in hospital or on the sick list. **K.R., 176, 181, 186, 187.**

Any power or jurisdiction given to the holder of any military office may be exercised by any other person authorized to act for him by the custom of the Service or in accordance with the Rules of Procedure ; and similarly where any order is to be made by the Army Council or any Officer, such order may be signified under the hand of any Officer authorized to issue orders on behalf of the Army Council or the other Officer. **ss. 171, 172 (1).**

Exceptions to this rule are, the order convening a Field General Court-Martial, which must be signed personally by the Officer convening the Court ; and the orders *under the hand* of the Officer certifying that military exigencies exist.

**R.P. 64 (c), 104, App. II, p. 700**

## CHAPTER II

### THE MILITARY CODE

THE code of Military Law is laid down partly in Acts of Parliament, and partly in Regulations made under the authority of those Acts or in accordance with the custom of the Service.

The chief Acts of Parliament relating to Military Law are the Army Act, 1881 ; the Army and Air Force (Annual) Act ; the Reserve Forces Act, 1882 ; the Regimental Debts Act, 1893 ; the Reserve Forces and Militia Act, 1898 ; the Territorial and Reserve Forces Act, 1907 ; and the Territorial Army and Militia Act, 1921.

The Army Act, which was passed in 1881, embodies the contents of the old Mutiny Acts and former Enlistment Acts, and thus the greater part of the Statute Military Law has been codified. In order, however, to continue the constitutional principle of Parliamentary sanction to the maintenance of a Standing Army, it is expressly enacted in s. 2 that the Act is only to remain in force for such time as may be specified in an Annual Act bringing it into force or continuing it.

It is divided into five parts, dealing respectively with the following subjects :—

Part I. Discipline.

Part II. Enlistment.

Part III. Billeting and impressment of carriages.

Part IV. General provisions.

Part V. Application of military law, saving provisions, and definitions. **s. 3.**

Any necessary amendments are made by the Army (Annual) Act, which is passed in the spring of each year. Any such amendments come into force in any place from the date from which the Army Act is continued in force in that place (*vide* note on next page), unless otherwise stated.

**A. (Ann.) Act, 1904, s. 14.**

The Army (Annual) Act\* commences with a preamble, which is practically the same as that of the former Mutiny Acts, stating the necessity for the maintenance of a Standing Army, and fixing the number of men to be kept up for the next twelve months (exclusive of those in India), and the necessity for trying and punishing offences against military discipline in a more exemplary and speedy manner than the ordinary law allows ; s. 1 gives the short title of the Act ; s. 2 continues the Army Act in force for a further twelve months, commencing from different dates in various parts of the world† ; s. 3 fixes the prices to be paid for billets during the ensuing year ; and other sections are added when any amendments are required in the Army Act.

Such amendments are added to, or omitted from, all copies of the Army Act printed subsequently to the Act making them ; and any reference to the Army Act in any statute is to be construed as referring to the Army Act so amended.

#### **A. (Ann.) Act, 1885, ss. (2), (3).**

The principal Regulations are :—

*Rules of Procedure*, made by the King, through a Secretary of State, under the authority of the Army Act, s. 70. These Rules must not contain anything contrary to or inconsistent with the Act ; but on any point as to which the Act is silent, any provision in the Rules has statutory force. They are to be “judicially noticed” by all Courts of Law. They deal with :

- (a) The assembly and procedure of Courts of Inquiry ; and the empowering of such Courts to take evidence on oath.
- (b) The convening, constitution, and procedure of Courts-Martial.
- (c) The confirmation, revision, and execution of findings and sentences of Courts-Martial.

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\* This Annual Act is now entitled the “ Army and Air Force (Annual) Act.”

† (a) In the United Kingdom, Channel Islands, and Isle of Man from 30th April.

(b) Elsewhere, whether within or without the King’s dominions from 31st July.

- (d) Making the necessary forms of orders relating to Courts-Martial.
- (e) Any other matters necessary for carrying the Army Act into effect. **s. 70.**

In construing these Rules expressions used in them have, unless the contrary intention appears, the same meaning as in the Army Act.

**Interpretation Act, 1889, s. 31 ; R.P., 135 (D).**

The Rules apply everywhere, either within or without the King's Dominions ; and as regards the Channel Islands and Isle of Man as though these places were part of the United Kingdom, except where specially provided. **R.P. 136, 137.**

*Orders in Council*, made by the King in Council, under the authority of various Acts of Parliament—*e.g.* :—

Order in Council of the 6th February, 1882, respecting discipline on board H.M. Ships, made under the authority of the Naval Discipline Act, as amended by Orders in Council of the 30th June, 1890, 13th February, 1912, and 4th May, 1923. **Man., p. 728 ; A.O.  $\frac{235}{28}$ .**

Order in Council of the 13th October, 1922, defining the duties of the members of the Army Council, made under the authority of 33 & 34 Vict., c. 17. **K.R., App. I.**

*Royal Warrants*, made by the King under the Royal Sign Manual and countersigned by the Secretary of State. They are issued by this Minister and promulgated to the Army in Army Orders. They deal with matters of finance, and the appointment and promotion of Officers, and the conditions of retirement of Officers and men, *e.g.*, Royal Warrant for Pay.

It is difficult to define accurately the limits of an Order in Council or a Royal Warrant ; but for practical purposes it may be said that the statutory powers vested in the Crown are exercised by an Order in Council as a rule, whereas a Royal Warrant is the instrument



by which the Sovereign authorizes executive acts of his own will.

*King's Regulations*, approved by His Majesty by virtue of His Royal prerogative, and issued by the Army Council for general guidance throughout the Army, to be strictly observed on all occasions. These Regulations now contain the Regulations for the Army Reserve made under the provisions of the Reserve Forces Act. It is specially laid down in the order circulating them that they are to be interpreted "reasonably and intelligently." A provision in the Regulations cannot override either the Act or the Rules, and must be regarded as merely directory.

*Army Orders*, issued monthly by the Army Council, with the approval of the Secretary of State. They deal with questions of discipline, organization, training, etc.; and amendments in existing Regulations are notified in them.

*Army Council Instructions* have largely superseded War Office Letters, and are used for conveying the instructions of the Army Council with regard to the details of matters of administration. They are issued as required.

It may, perhaps, be useful here to remark that the Army Act and Rules of Procedure, as bound up in the Manual of Military Law, with notes, are only so published for the convenience of Officers and others in the Army. The notes printed in smaller type after the section of the Act, or the Rule, to which they refer, have not the same authority as the Act itself or the Rules of Procedure, though, as they are issued with the official sanction of the War Office, they have, of course, great weight, and should not be lightly disregarded. In referring to the Army Act or the Rules of Procedure, the *Section* or *Rule* should be quoted, and not the page of the Manual upon which it appears. Thus :—

Army Act, s. 10 ; or R.P. 83 (B).

Similarly, the King's Regulations are quoted by *para-*

*graphs* ; thus, K.R., para. 460 ; and the Royal Warrant for Pay by *articles*, thus, R.W., art. 946.

It should be noted that the " custom of the Service " is expressly recognized both by the Army Act and the Rules of Procedure, and would ordinarily be held to be a justification for anything done in pursuance of such custom.  
**s. 171 ; R.P. 129, 131.**

It is ordered that the sections of the Army Act which deal with crimes and punishments and methods of redress of complaints (*i.e.*, ss. 4 to 44) are to be read at the head of every unit once every three months.

**K.R. 519.** An abstract of the most important duties and obligations and the penalties incidental to the commission of the chief offences is also inserted in the Soldier's Pay Book (A.B. 64). Every precaution is taken that a soldier may not be betrayed into crime by ignorance as to the penalty ; the legal maxim which makes ignorance of the law no excuse, can never be more justly applied than to the case of military delinquents.  
**Simmons, p. 48.**

## CHAPTER III

### PERSONS SUBJECT TO MILITARY LAW

ALL persons who are subject to Military Law are so subject either as *Officers* or as *Soldiers*.

Again, some such persons are always subject, while others are only subject at stated times, and under certain conditions.

The following tables show the various individuals who are subject in either class :—

#### A. SUBJECT ALWAYS.

##### (i) *As Officers.*

Officers of the Regular Forces on the active list as defined by Royal Warrant. This includes Officers on full or half pay ; but does not include retired Officers, recalled to service or re-employed.

**s. 175 (1) ; R.W. 21 (A) ; A.O. <sup>1</sup>/<sub>28</sub>.**

Officers of the Permanent Staff of Auxiliary Forces.

**s. 175 (2).**

Officers of the Militia.

**s. 175 (10) ; T.A. & M. Act, s. 3.**

Officers of the Territorial Army on the active list.

**s. 175 (3A) ; A. (Ann.) Act, 1919, s. 15.**

Officers of Colonial Forces, raised at the Imperial expense (*e.g.*, Royal Malta Artillery).

**s. 175 (4).**

##### (ii.) *As Soldiers.*

Soldiers of the Regular Forces.

**s. 176 (1).**

Non-Commissioned Officers and men of the Permanent Staff of Auxiliary Forces.

**s. 176 (2).**

Soldiers of Colonial Forces, as above.

**s. 176 (3).**

## B. SUBJECT AT STATED TIMES.

### (i) *As Officers.*

Officers of the Regular Forces not on the active list employed on military duty under an Officer of the Regular Forces. **s. 175 (1).**

A retired Officer appointed Colonel of a Regiment does not as such become subject to military law.

Officers of Marines, when not borne on the books of any King's ship. **ss. 179 (15), 190 (8).**

Officers of the Air Force, when attached to, or seconded for service with, the Regular Forces.

**s. 179A (2) ; A.F. (Const.) Act, s. 7.**

Officers of the Reserve (other than the Militia) when ordered on any duty or service to which they are liable. **s. 175 (10).**

Officers of the Territorial Army Reserve when doing duty with troops subject to military law, or when ordered on any duty or service for which they are liable. **s. 175 (3A) ; A. (Ann.) Act, 1919, s. 15.**

Officers of Volunteers, when—

- (a) Commanding men subject to Military Law.
- (b) Attached to regulars or troops subject to Military Law.
- (c) Ordered on duty with their own consent.
- (d) Their corps is on actual military service.

**s. 175 (5), (6).**

Officers of any force raised in India or a Colony, when attached to or doing duty with any portion of the Forces in the United Kingdom ; or when the Army Act has been applied to them by the law of India or the Colony. **s. 175 (11), (12).**

Officers of the Indian Army Reserve, when called out in any military capacity. **s. 175 (9).**

Persons accompanying troops on active service in an official capacity equivalent to that of an Officer (*e.g.*, Political Agents, and the Matrons, Sisters and Staff Nurses of the Military Nursing Service). **s. 175 (7).**

Persons accompanying troops on active service holding a pass from the Commanding Officer of the force entitling them to the status of an Officer (*e.g.*, contractors, or newspaper correspondents).\* **s. 175 (8).**

(ii) *As Soldiers.*

Pensioners employed on military service under the orders of an Officer of the Regular Forces. **s. 176 (4).**

This only includes those employed on duties which they are only qualified to perform *qua* pensioner, and does not include pensioners performing duties which could be done equally by civilians; but a pensioner appointed a paid Recruiter becomes subject while holding the appointment. **A.O.  $\frac{337}{21}$ .**

Non-Commissioned Officers and men of the Marines, when not borne on the books of any King's ship.

**ss. 179 (15) ; 190 (8).**

Airmen of the Air Force when attached to Regular Forces. **A.F. (Const.) Act, s. 7.**

Non-Commissioned Officers and men of the Reserve† when—

- (a) Called out for training or exercise.
- (b) Called out in aid of the Civil Power.
- (c) Called out on permanent service.‡
- (d) Employed on military service under the orders of an Officer of the Regular Forces.

**s. 176 (5).**

Non-Commissioned Officers and men of the Territorial Army, including the Reserve Division, when—

- (a) They are being trained or exercised.
- (b) Attached to regulars.

\* The Regulations as to civilians with an Army in the field are laid down in Field Service Regulations, Vol. I, ss. 215-220.

† This includes the Militia, who are part of the Reserve Forces.

**T. & R. F. Act, s. 30 (1) ; T. A. & M. Act, s. 3.**

‡ They are deemed to be called out on permanent service from the time fixed for them to attend in the notice calling them out. **R.F. Act, s. 12 (3).**

(c) Embodied.

(d) Called out for actual military service for purposes of defence.

**s. 176 (6A) ; T.F.R., App. xxvii., para. 4.**

\* Non-Commissioned Officers and men of the Volunteers, when—

(a) Training with regulars.

(b) Attached to regulars.

(c) Their Corps is on actual military service.\*

*Note.*—That in any case, except the last, they must be warned beforehand by their Commanding Officer that by going on the service they will become liable to military service.

**s. 176 (8).**

Non-Commissioned Officers and men of any Force raised in India or a Colony, when attached to or forming part of any portion of the Forces in the United Kingdom ; or when the Army Act has been applied to them by the law of India or the Colony. **s. 176 (8A), (11).**

Persons employed by, or in the service of, any of H.M. troops on active service. **s. 176 (9).**

Camp followers on active service. **s. 176 (10).**

It was held that the crew on board one of His Majesty's hired transports during the late war did not come within the meaning of this sub-section.

*Note.*—A person's liability to military law is not affected by the fact that he is a subject of a foreign State.

**Clode, Mil. Law, p. 94.**

#### MODIFICATIONS IN THE APPLICATION OF THE ACT.

In applying the Act to certain people included in the foregoing classes, some modifications are made, of which the following are the chief :—

In the case of Officers, soldiers, or followers, who are natives of India, Indian Military Law, as laid down in

\* They are deemed to be on actual military service from the time their Corps is called out. **Vol. Act, s. 17.**

the Indian Army Act made by the Government of India, is to be followed. Half-castes and persons born in India of certain degrees of European descent are for the purposes of the Army Act considered Europeans.

**s. 180 (2).**

European Officers of the Indian Army and European Non-Commissioned Officers and men serving in the Indian Army Departments are subject to the Act as Officers or soldiers of the Regular Forces.

**s. 190 (8).**

An Officer of the Indian Army may be sentenced by Court-Martial or by the Officer having power to deal summarily with his case to forfeiture of all or any part of his service towards promotion; and in addition to be severely reprimanded, or reprimanded.

**s. 180 (2) (e) ; A. (Ann.) Act, 1919, s. 17 ;**

**A. & A.F. (Ann.) Act, 1920, s. 6.**

In this connexion the following notes regarding the various grades of the subordinates of the Indian Medical Service may be useful :—

Senior Assistant Surgeons are Officers with honorary rank ;

Assistant-Surgeons, of whom there are four classes, are Warrant Officers, Class I.

All the above are subject to the Army Act.

**A.R.I., Vol. II, 132.**

Sub-Assistant-Surgeons are Indian Officers ;

Sub-Assistant-Surgeons under five years' service are Indian Warrant Officers.

These are all subject to the Indian Army Act.

**I.A. Act, s. 2 (1) ; A.R.I., Vol. II, 115, 146.**

Warrant Officers holding honorary commissions are subject to military law as Officers ; those not holding such honorary commissions are subject as Non-Commissioned Officers, except :—

- (1) They cannot be punished by their Commanding Officer.

(2) When tried by a District Court-Martial, the Court can only inflict certain specified punishments (see p. 111).

(3) If reduced to the ranks, they are not required to serve, and may claim their discharge.

**ss. 182, 190 (4) ; A. & A.F. (Ann.) Act, 1920, s. 5.**

A Warrant Officer, Class II, holding the acting rank of Warrant Officer, Class I, may be ordered by his Commanding Officer to revert to his permanent rank otherwise than by way of punishment for an offence.

Warrant Officers, Class II, holding substantive rank as such are, for all purposes of the Act, Warrant Officers, and not Non-Commissioned Officers. **A.O.  $\frac{279}{17}$ .**

Non-Commissioned Officers (which term includes acting Non-Commissioned Officers) are subject as soldiers, except :—

- (1) A Commanding Officer is not obliged to deal summarily with an offence of drunkenness committed by a Non-Commissioned Officer.
- (2) The Army Council, and in India the Commander-in-Chief or such Officer as he may appoint, and on active service the Officer Commanding-in-Chief or any General or Colonel Commandant, he or the Army Council may appoint, can reduce a Non-Commissioned Officer to a lower grade or to the ranks. The date from which the reduction is to take effect must not be prior to the date of the order. A Non-Commissioned Officer so summarily reduced cannot claim trial by Court-Martial under s. 46 (8).
- (3) A Non-Commissioned Officer sentenced by Court-Martial to penal servitude, field punishment, imprisonment, or detention, shall be deemed to be reduced to the ranks.
- (4) An acting Non-Commissioned Officer may be ordered by his Commanding Officer, either for an offence or otherwise, to revert to his permanent grade.



- (5) A Non-Commissioned Officer, though not exempt by the Army Act, when punished summarily by his Commanding Officer, can only be awarded the punishments laid down in King's Regulations.

**ss. 183, 190 (5) ; A. (Amend.) Act, s. 3 ; A. & A.F. (Ann.) Act, 1920, s. 4 ; K.R., 362, 560.**

When Officers or Petty Officers of the Navy are acting with or attached to any body of Military Forces, or when Officers or soldiers of the Military Forces are acting with or attached to any Naval Force, under such conditions as may be prescribed by the Admiralty and Army Council, the Officers and Petty Officers of the Navy are to be treated and have the same powers of command and discipline (except power of punishment) as if they were Military Officers or Non-Commissioned Officers.

**s. 184 A (1), (2) ; A. (Amend.) Act, s. 4 ; A.O.  $\frac{180}{18}$ .**

A similar provision is made in the case of Officers and Non-Commissioned Officers of the Air Force when acting together with Officers and soldiers of the Army, under conditions prescribed by the Army Council and Air Council.

**s. 184 A (1A), (2A) ; A.F. (Const.) Act, s. 7 ; A.O.  $\frac{100}{18}$ .**

The Marines are part of the regular forces, and as such ordinarily subject to military law. **s. 190 (8).** When, however, they are borne on the books of any ship commissioned by His Majesty, they are subject to the Naval Discipline Act, unless they are employed on land, when the Senior Naval Officer present may order that, while so employed, they are to be subject to military law. **s. 179 (15), proviso (b).** Even while subject to the Naval Discipline Act, if a Marine commits an offence for which he is not amenable to a Naval Court-Martial, he can be tried and punished under the Army Act if it is an offence against the latter Act.

**s. 179 (16).**

The power of the Admiralty to make Articles of War for the governance of the Marines is specially reserved,

and the Admiralty have the powers given by the Act to various military authorities in connexion with soldiers of the Land Forces. A General Court-Martial for the trial of a Marine can only be convened by an Officer having a warrant from the Admiralty, except in special cases beyond the seas. **s. 179 (1).**

The provisions of the Army Act relating to enlistment and conditions or forfeiture of service do not apply to the Marines. A Marine convicted of absence, or who fraudulently enlists, forfeits his service in the same way as he forfeits it for desertion under the Marine Act. **s. 179 (12), (14).** Under this last-mentioned Act, a Marine who is absent from duty by reason of imprisonment by sentence of Court-Martial, or desertion, does not reckon such period of absence as part of his service towards limited engagement.

**10 & 11 Vict., c. 63, s. 8.**

As regards Officers and men of the Air Force, the Air Council or Officers appointed by them have the powers given by this Act to the Army Council and various military authorities. A General Court-Martial for their trial can only be confirmed by the King or an Officer having a warrant under the Air Force Act, except in special cases beyond the seas. If an Officer or man of the Air Force, while subject to military law, commits an offence for which he is not amenable under the Army Act, but for which he is liable under the Air Force Act, he can be tried under the latter Act.

**s. 179A ; A. (Ann.) Act, 1919, s. 16.**

When a soldier of the Territorial Army or the Volunteers is subject to Military Law a Court-Martial may sentence him to dismissal in addition to or instead of any of the punishments mentioned on p. 23 *et seq.*

**s. 181 (6).**

Colonial Forces raised by any Colony on the responsibility of the Colonial Government are subject to the law of that Colony ; but, if serving with the Regular Forces elsewhere than in the United Kingdom, then,

**c**

so far as the Colonial law may be deficient for their discipline, they become subject to the Army Act. When doing duty with the forces in the United Kingdom they are always subject. **s. 177.**

Persons who do not belong to His Majesty's forces cannot be punished by their Commanding Officer, but are deemed to be under the command of the Commanding Officer of the corps to which they may be attached, provided that, if possible, such persons are not to be placed under the command of an Officer whose rank is inferior to their official rank.

**s. 184.**

An Officer or soldier may be dealt with according to the rank in which he is apparently serving at the time, although in fact his actual status may be different from that which it apparently is. A Non-Commissioned Officer who is promoted to a commission can still be tried for any offence committed while in the ranks, but he can only be tried as an Officer and punished accordingly. **O'Dowd, p. 26.**

### *Illustrations.*

1. Lieutenants A. and B., whose commissions as Lieutenants are dated 1st May, 1913, and 3rd June, 1914, respectively, are serving in Mauritius on the 10th October, 1918. A. is the superior officer of B. on this date, although by the *London Gazette* dated 26th September, 1918, which is not received in Mauritius till the 30th October, 1918, B. was promoted Captain dated 25th September, 1918.

2. Serjeant C. is tried by Court-Martial and reduced to the ranks on 5th June, 1919. On the 8th June, 1919, he commits an offence for which he is awarded 168 hours detention by his Commanding Officer. On the 20th June, 1919, the conviction by Court-Martial is quashed. He will be restored to his former rank of Serjeant, but the award on 8th June is legal, and the record will remain in his documents.

## CHAPTER IV

### CRIMES AND PUNISHMENTS

As already stated, all persons subject to military law are so subject either as Officers or soldiers. In the sections of the Act dealing with the different military offences, the punishment to which either of these classes is liable on conviction of each offence is stated. In every case, except two, the law has laid down the maximum punishment which may be awarded to either an Officer or soldier, and allows the Court to award that maximum or any less punishment they may think fit, *i.e.*, one lower in the scales to be presently mentioned.

The two exceptions are :—

1. An Officer convicted of “ Scandalous conduct ” must be cashiered. **s. 16.**
2. An accused convicted of “ Murder ” is liable to suffer death ; no alternative punishment is mentioned. **s. 41 (2).**

It has been ruled, however, that this does not apply if the charge is laid under s. 6 (1) (*f*) in relation to an inhabitant or resident of the country where the accused is serving, and in such a case the Court could award a less sentence than death.

#### SCALE OF PUNISHMENTS.

Two scales of punishments are laid down, one applicable to Officers, the other to soldiers. **s. 44.**

The punishments to which Officers are liable are :—

1. Death ; by being shot or by being hanged. The former would be given in the case of purely military offences ; the latter in the case of disgraceful offences, like murder.

2. Penal servitude for not less than three years, up to life. It will be noticed that, unlike the ordinary criminal law, various limits of penal servitude are not fixed for the different military offences, but whenever it can be given at all it can legally be given for life. For offences under s. 41 (5) it can only be given up to the limit fixed by the ordinary law. (For these limits *vide* the table at the end of Man., Ch. VII.) It commences to count from the date on which the original Proceedings of the Court are signed by the President.

**s. 68 (1) and note 3.**

3. Imprisonment, with or without hard labour, for not more than two years. The sentence begins to count from the date on which the original Proceedings of the Court are signed by the President, so that if a prisoner is already under sentence the two terms of imprisonment will run concurrently. No one can be imprisoned by Court-Martial for more than two consecutive years, whether under one or more sentences. Detention in custody or by the Civil Power counts ; but where there is a single day's freedom, as by escape, the continuity is broken. **s. 68 (and note).**

4. Cashiering. Note that Officers, before being sentenced to penal servitude or imprisonment, are to be cashiered. **s. 44 (2).**

5. Dismissal from His Majesty's Service. This differs from cashiering, inasmuch as an Officer who has been cashiered is thereby disqualified from ever serving the Crown again in any capacity, civil or military ; whereas dismissal does not entail such disqualification. **Clode, Mil. Law, p. 167, note.**

A sentence of cashiering or dismissal takes effect from the date of promulgation, and the

Officer remains subject to Military Law, and receives pay up to the day preceding promulgation. **R.W., 427.** It has been ruled that a sentence of dismissal from His Majesty's Service will include dismissal from the Navy or Air Force, if the Officer also holds a commission in either of these Services.

Apart from sentence by Court-Martial, the Crown has the right at any time to dispense with the services of any Officer, and he is liable to be removed for misconduct, or, even if not guilty of actual misconduct, may be called upon to retire or resign his commission if the Army Council consider it necessary. **R.W. 523, 524 ; Clode, Vol. II, p. 118 ; Anson, Pt. II, pp. 363, 392.** On the other hand, no Officer has the right to resign his commission, and must continue to serve unless such resignation is accepted by the Crown. **Man., XI, 9 ; Clode, Vol. II, p. 96 ; Anson, Pt. II, p. 363.** Under the existing Royal Warrant an Officer is not permitted to retire voluntarily unless the Army Council deem it expedient. **R.W., 512.**

6. Forfeiture of rank either in the Army or his Corps, or both ; or where an Officer's promotion depends on length of service, forfeiture of all or any part of this service towards promotion. **A. & A.F. (Ann.) Act, 1922, s. 4 (1).** Forfeiture of rank is effected by sentencing the Officer to take rank in the Army or his Corps as though his commission bore date the day after that of the Officer below whom it is intended he shall take precedence. It must be noted that an Officer cannot be reduced to a lower rank. **R.P., 47.**

The Army Council may restore the whole or any part of any lost seniority or forfeiture of service to an Officer who performs good

service or is deemed worthy of such restoration. **A. & A.F. (Ann.) Act, 1922, s. 4 (2).**

Under the Forfeiture Act, 1870, an Officer convicted of treason or felony and sentenced by a Civil Court to death, penal servitude, or imprisonment with hard labour or exceeding twelve months, will forfeit his commission, or any employment under the Crown, or any pension.

**33 & 34 Vict., c. 23, s. 2 ; Glode, Mil. Law, p. 168.**

When Officers of the Air Force are tried under the Army Act, they can be sentenced to forfeiture of seniority of rank in the Air Force or any corps or unit thereof, or both.

**s. 179 A (2) (g) ; A. (Ann.) Act, 1919, s. 16.**

Similarly, Officers of the Navy, when subject to military law, can be sentenced to forfeiture of rank in the Navy.

**s. 179 B ; A. (Ann.) Act, 1919, s. 16.**

7. Reprimand, or severe reprimand, which may be administered publicly or privately, as the confirming authority may appoint.

**s. 44, note 5.**

In addition to or without other punishment an Officer may be sentenced to stoppages to make good any loss his offence may have occasioned, or to forfeiture of pay for every day of absence without leave. The loss must be the direct and natural consequence of his offence or negligence.

**ss. 44 (12), 137.**

An Officer can no longer be sentenced by Court-Martial to forfeiture of any decoration he may possess, as the Royal Warrant relating to such forfeiture has been amended ; but he will incur, or is liable to incur, such forfeiture as a *consequence* of certain convictions or sentences. **s. 44 (11) ; R.W. 631.** Officers who are members of any Order are dealt with under the Statute governing such Order as regards forfeiture or restoration. The several Royal Warrants instituting the

V.C., M.C., V.D., T.D., and Colonial Auxiliary Forces Officers' Decoration, lay down the conditions under which these decorations will be forfeited by, or may be restored to, an Officer. An Officer who suffers death, or is cashiered or dismissed by sentence of Court-Martial, or is removed from the Service for misconduct, *will forfeit* all war medals and any medal for Long Service and Good Conduct, with any gratuity appertaining to it, which he possesses or is entitled to. If he is convicted of any offence by the Civil Power, or dealt with under the Probation of Offenders Act, 1907, he is *liable* to a like forfeiture at the discretion of the Army Council. Forfeiture of a gratuity does not extend to any money already paid. Any such medal (with the gratuity, if any) may be restored at the discretion of the Army Council. **R.W. 631.** These provisions do not apply to foreign decorations and medals. **A.O.**  $\frac{299}{20}$ .

The punishments to which soldiers are liable are :—

1. Death.
2. Penal servitude for not less than three years.
3. Imprisonment, with or without hard labour, for not more than two years. This punishment should not, as a rule, be given for a purely military offence, if it is intended that the man should rejoin the colours. **K.R., 645 (iv).**
4. Detention for not more than two years ; or, when awarded for the offence of drunkenness, not on active service or on duty, not exceeding six months. **A. & A.F. (Ann.) Act, 1921, s. 6 (1).** This punishment was introduced by the Army (Annual) Act of 1906, to avoid the stigma attaching to imprisonment for soldiers convicted of offences against military discipline and who are not sentenced to discharge with ignominy. It is carried out either in military custody or detention barracks. **s. 63 (1).**



Sentences of penal servitude, imprisonment, or detention begin to count as in the case of Officers (*vide supra*, p. 20), unless the sentence has been suspended, when it begins as laid down in **s. 57A (3)**. (*Vide infra*, p. 240.)

5. Field punishment which can only be awarded on active service. The rules for carrying out this punishment are made by the Secretary of State and laid before Parliament.

**s. 44 (5), (9).**

Those at present in force are as follows :—

Field punishment may be awarded for any period not exceeding three months. Unless the Court otherwise directs, the soldier may be kept in fetters or handcuffs, and secured to prevent escape. Straps or ropes may be used instead of irons. He may be subjected to hard labour as under an ordinary sentence of imprisonment with hard labour. The punishment must be inflicted in such a manner as not to cause any injury or leave any permanent mark on the offender. If the unit is halted at a place where there is a Provost-Marshal, the punishment is carried out under this Officer ; in other cases or when on the move it is carried out regimentally ; and in the latter case all offenders march with their units, carrying their arms and accoutrements, perform all their duties and extra fatigues, and are treated as defaulters.

**A. & A.F. (Ann.) Act, 1923, s. 12 ; A.O. <sup>377</sup>/<sub>23</sub>, <sup>384</sup>/<sub>23</sub> ;**  
**Man., pp. 721, 722.**

6. Discharge with ignominy from His Majesty's Service. This punishment may be added to a sentence of penal servitude or imprisonment, but not to a sentence of detention ; and the King's Regulations state that it should be added in the case of persistent

offenders, or for offences of a disgraceful nature, and when a sentence of imprisonment is given. **s. 44 (4) ; K.R. 645 (xiii).**

A Non-Commissioned Officer or private of the Territorial Army is also liable to dismissal.

**s. 181 (6).**

7. Reduction in the case of Non-Commissioned Officers to a lower grade, or to the ranks. This punishment may be in addition to or without any other punishment. A reference to King's Regulations, para. 246, will show what positions in the Service are *ranks* and what are *appointments*. A sentence of reduction to or from an acting rank is inoperative, and is in law no sentence at all, *e.g.*, from Lance-Corporal to Private, because the *rank* of a Lance-Corporal is Private. A Non-Commissioned Officer sentenced to penal servitude, field punishment, imprisonment or detention, is deemed to be reduced, even if not expressly sentenced to reduction, but it is customary to reduce the accused before sentencing him to any of these punishments. A Lance-Corporal forfeits his acting rank on being sentenced to any one of the above punishments. A Non-Commissioned Officer reduced to a lower rank will take precedence in that rank from the date of signing the original sentence of the Court. A Court-Martial cannot therefore order that the reduction is to take effect from any other specified date. If a sentence of reduction is remitted he will, if no service is forfeited, retain his original seniority in his rank.

**s. 183 (3), (4), (and note 4) ; K.R. 265.**

8. Forfeiture of seniority of rank in the case of Non-Commissioned Officers in the same manner as described in the case of Officers, *ante*. This forfeiture will affect only his seniority

in the rank, and not his period of service in it. This punishment may be in addition to or without any other punishment.

**s. 44, note 12 ; 183 (3).**

9. In the case of Non-Commissioned Officers severe reprimand or reprimand ; which can be added to a sentence of forfeiture of seniority of rank. **A. & A. F. (Ann.) Act, s. 12 (1).**
10. Forfeitures. These include forfeitures of deferred pay, service towards pension, or any military decoration or reward, including good conduct badges and pay, and any annuity for good conduct as may be provided by Royal Warrant. Under the provisions of the Royal Warrant these forfeitures cannot be awarded by a Field General Court-Martial.

**ss. 44 (11), 190 (18), (19) ; R.W. 941, 956, 1009, 1138.**

No provision is made in the Warrant for forfeiture of decorations by *sentence* of Court-Martial, hence these forfeitures cannot be awarded. A soldier will, however, incur or be liable to incur, forfeiture of his decorations as a *consequence* of certain convictions or sentences. The several Royal Warrants instituting the V.C., M.C., D.C.M., M.M., and M.S.M. lay down the conditions under which these decorations and medals will be forfeited by, or may be restored to, a soldier. A soldier who suffers death by sentence of Court-Martial, or who is discharged with ignominy, or for misconduct, or in consequence of being sentenced to penal servitude, or on conviction of felony by the Civil Power, *will forfeit* all war medals and any medal for Long Service and Good Conduct, with any gratuity appertaining to it, which he possesses or is entitled to. If he is convicted of any offence by the Civil Power, or dealt with under the Probation of Offenders Act, 1907,

he is *liable* to a like forfeiture at the discretion of the Army Council. Forfeiture of a gratuity does not extend to any money already paid. Any such medal (with gratuity, if any) may be restored at the discretion of the Army Council. **R.W. 1118, 1121.** Medals awarded on a previous attestation are included. These provisions do not apply to foreign decorations or medals. **A.O.  $\frac{200}{20}$ .**

11. Fines. These can only be given for drunkenness, and must not exceed five pounds.

**ss. 19, 44, note 18 ; A. & A.F. (Ann.) Act, 1921,**

**s. 6 (1).**

12. Stoppages. These can be given to make good any loss, expenses or damage occasioned by the accused's offence, and must not exceed the amount necessary to do this. **s. 138 (3), proviso (b)** (and *notes 18 and 19*). In the case of damage to mechanical vehicles the amount of the stoppage is usually to be limited to the equivalent of fourteen days' pay, **K.R., 557** ; or where Government property is damaged by fire, through neglect, the equivalent of one week's pay. **K.R., 1368.** Where the damage has been caused by two or more soldiers, each can be legally sentenced to make good the whole amount, so that in the event of its being impossible to recover his share from one, the other is liable for the whole, but if both remain amenable, the stoppage would be equally divided between them. **s. 138 (note 19) ; R.P., 46 (A) (note 1).** The total stoppages recovered, however, must leave the soldier at least one penny a day, after paying for his messing and washing,\* the stoppage for which must not exceed 5½d. a day. **s. 138, proviso (a) ; R.W., 867.** In cases where a Court-

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\* When a man is in debt the cash issue to him must not exceed 1s. a day except in special cases. **R.W. 867 ; Army Council's instructions.**

Martial has not exercised its power of sentencing an offender to stoppages, the amount necessary to make compensation can be deducted from his pay by order of the Army Council under the Royal Warrant. **s. 136.**

13. On active service a Court-Martial may, in addition to or without any other punishment, order the offender to forfeit all ordinary pay for any period commencing on the day of the sentence and not exceeding three months. **s. 44 (6).** When the soldier is already liable to any other penal deductions from his pay, the sentence only applies to the balance after these other deductions have been made.

**s. 138, proviso (c).**

Forfeiture of pay for absence without leave or desertion might be given by a Court-Martial, but the sentence would have no effect, as, under the Act and the Royal Warrant, an Officer or soldier forfeits his pay for every day of such absence. **ss. 44 (12), 137 (1), 138 (1) ; R.W. 434, 856.** A "day" is reckoned to be absence for six consecutive hours, either wholly in one day, or partly in one day and partly in another, or where, by reason of his absence, the soldier has missed a duty, which has thereby been thrown on another person; but no period of less than twenty-four hours can be reckoned as more than one day.

**s. 140 (2) ; A. (Ann.) Act, 1918, s. 8 ; R.W., 857, 858.**

### *Illustrations.*

- |            |  |                       |
|------------|--|-----------------------|
| Private A. | Absent from Tattoo 3rd May till 3 a.m. 4th May.  | Forfeits no pay.      |
| Private B. | Absent from guard mounting at 9 a.m. till found in his room at 9.30 a.m. (another man having been taken for guard in his place). | Forfeits 1 day's pay. |
| Private C. | Absent from Tattoo 3rd May till 4 a.m. 4th May.  | Forfeits 1 day's pay. |
| Private D. | Absent from Tattoo 3rd May till 2 p.m. 4th May.  | Forfeits 1 day's pay. |
| Private E. | Absent from guard mounting at 9 a.m. till 4 p.m. same date (another man having been taken for guard in his place).               | Forfeits 1 day's pay. |
| Private F. | Absent from parade at 11 a.m. till 3 p.m. same date.   | Forfeits no pay.      |

- Private G. Absent from picquet at 7 p.m. 3rd May till 3 a.m. 4th May (another man having been taken for picquet in his place). Forfeits 1 day's pay.
- Private H. Absent from Tattoo 3rd May till 12.30 a.m. 5th May. Forfeits 2 days' pay.
- Private I. Absent from Tattoo 3rd May till 12.30 a.m. 6th May. Forfeits 3 days' pay.

Pay for alleged period of absence cannot be forfeited unless the man is convicted of absence ; so in a case where the conviction was quashed the man forfeited no pay during the period of absence.

A soldier also forfeits his pay for every day—

- (a) Of imprisonment ;
- (b) Of detention ;
- (c) Of field punishment ;

Pay is only forfeited for the actual days of confinement while undergoing field punishment, so that when, as frequently happened during the late war, a man is released to take part in an attack, he forfeits no pay for the days not actually in confinement.

(d) Of confinement—

- (i) On a charge of which he is afterwards convicted by a Court-Martial, or Civil Court ; unless no entry of the civil conviction is made in the Regimental Conduct Sheet.
- (ii) On a charge of absence without leave for which he is awarded detention or field punishment by his Commanding Officer.

A “ day of confinement ” is reckoned in the same way as a day of absence, as explained above.

- (e) In hospital through sickness which the Medical Officer certifies was caused by an offence against the Army Act, of which he has been convicted.

This does not include sickness caused by immorality or intemperance, where there has been no conviction.

The Officer who disposes of such an offence must at once inform the Medical Officer, who will give the certificate on A.F. O 1644. If it is believed that a soldier has been admitted to hospital in consequence of an offence, the Commanding Officer will make a preliminary inquiry and inform the Medical Officer of the result, so that he can give or refuse the certificate. This Officer must attend the investigation of the offence by a Court-Martial or the Commanding Officer and give evidence ; the certificate alone is not sufficient.

**K.R., 565, 566.**

(f) Of absence as a prisoner of war, if it is proved to a Court of Inquiry that he was taken prisoner through his own neglect.

**s. 138 (1), (2) and notes ; R.W. 856, 857, 862.**

### *Illustrations.*

- |   |                       |
|---|-----------------------|
| Private A. Confined at 11 a.m. 3rd May for being drunk on parade ; and at 10 a.m. on the 4th May, awarded 168 hours' detention and fined 20s.   | Forfeits 7 days' pay  |
| Private B. Absent from Tattoo 3rd May till 3 a.m. 4th May, when he returns and is confined till 10 a.m. same day, when he is awarded 7 days' C.B.   | Forfeits no pay.      |
| Private C. Absent from Tattoo 3rd May till 4 a.m. 4th May, when he returns and is confined till 10 a.m. same day, when he is awarded 96 hours' detention, and goes to detention barracks that day at 2 p.m. | Forfeits 5 days' pay. |

No deductions can be made from the pay of an Officer or soldier other than those authorized by the Army Act, or any other Act, or any Royal Warrant in force, or any law passed by the Governor-General of India in Council. Under the Royal Warrant now in force the Army Council may order deductions from any emoluments of an Officer or soldier to meet any public claim or any regimental debt or claim. **s. 136 ; R.W. 9.**

A "public claim" means any public debt or disallowance, including over-issues made in ignorance of facts, or a deficiency or irregular expenditure of public money or stores for which no satisfactory explanation is given. **R.W. 23.**

A similar Royal Warrant authorizes the Governor-General of India to order like deductions from the pay of an Officer or soldier serving in India to meet a public claim or regimental debt or claim.

**A.R.I., Vol. I, preamble.**

A soldier cannot be put under stoppages to pay a private debt, and the creditor must pursue his remedy under the ordinary civil law. The General Officer Commanding-in-Chief must insert a notice in the principal newspapers in his Command, informing the inhabitants that if they allow soldiers to contract debts they do so at their own risk.

**K.R., 496.**

The pay of a soldier can be stopped to pay a fine awarded by a Civil Court.

**s. 138 (7).**

**OFFENCES.**

In arranging the sections dealing with the different military offences, the principle adopted has been to group together offences of a like nature, and then to arrange the various groups in order according to their relative gravity.

**Man., III, 2.**

Taking these groups in their order :—

**OFFENCES IN RESPECT OF MILITARY SERVICE.**

s. 4.—The offences mentioned in this section can only be committed on active service, and the offender is liable to death.

*Shamefully abandoning a Garrison or Post.*—This offence can only be committed by the person in command. The word “post” includes any position, whether fortified or not, which a detachment has been ordered to hold. It must be proved that the abandonment was *shameful*.

The King's Regulations direct that anyone who displays a white flag in the presence of the enemy in token of surrender is to be tried by a General Court-Martial. If the evidence is not sufficient to justify a charge under ss. 4 or 5, he will be charged under s. 40.

**K.R., 615.**



s. 5.—These offences can only be committed on active service, but, not being deemed so serious as those in s. 4, the maximum penalty is penal servitude.

s. 6.—These offences, except 1 (a) and (g), can be committed either on active service or in peace time. If on active service, the offender is liable to death for all except two in sub-section (2), for which the maximum penalty is penal servitude; if not on active service, the penalty is cashiering for an Officer, and imprisonment for a soldier.

*Without orders, leaving his Guard or Post.*—Here the word “post” means the place where it is the duty of any Officer or soldier to be, as a sentry’s beat. A Non-Commissioned Officer on gate or canteen duty leaving his post would be charged under this section.

*Forcing a Safeguard.*—A safeguard is a party of soldiers detached for the protection of some particular person, or a house or other property. A sentry furnished by this party is part of the safeguard, and to force him constitutes the offence. A military policeman or other soldier posted as a “Traffic Control” on active service is not a safeguard. Some authorities say the term “safeguard” includes a written document, given to the person to be protected, or posted on the property itself.

**Man., XIV, 335—337 ; Hall, sec. 195.**

*Forcing or striking a sentry.*—Actual force is not necessary to constitute this offence. If a soldier, for instance, on being warned by a sentry not to pass his post, rushed past him without touching him, he would be guilty of having “forced the sentry.”

*When acting as sentinel, being drunk or asleep on his post, or leaving it before he is regularly relieved.*—A sentry found asleep or drunk a short distance off his post cannot be charged with being asleep or drunk on his post; but should be charged with leaving his post; and if drunk, with a second charge for that offence under s. 19. Even though he has not been

regularly posted, a soldier is liable for an offence committed *on his post* if, being one of the guard or party furnishing the sentry, he has undertaken the duties ; but if he commits the offence of *leaving his post*, it is necessary to prove he was regularly posted. A soldier commits the offence of leaving his post who leaves it even for a meritorious purpose, as, for example, to put out a fire ; but in practice he would never be tried for it. **O'Dowd, p. 34.** This section does not apply to "stablemen," that is, soldiers employed in the care of horses and stables, and who are not regularly posted and relieved. **K.R., 619.**

It has been ruled that a telephone operator is not a sentry ; neither is a night watchman in a Detention Barrack ; nor a military policeman on gate duty, whose tour of duty was "four hours on and four hours off." A sentry's tour of duty does not extend beyond two hours. **K.R., 1297.**

#### MUTINY AND INSUBORDINATION.

s. 7.—*Mutiny* is collective insubordination, or the combination of two or more persons to resist lawful military authority. The essence of the offence is the combination to resist authority, hence one man, no matter how insubordinate, cannot mutiny. **Man., III, 4.** It is not necessary to prove previous or express concert, provided it is proved beyond reasonable doubt that the accused so acted, either before or during the resistance, as to show a common purpose in the matter. **O'Dowd, p. 35.**

*Insubordination* is individual resistance to military authority ; any act, language, or disobedience in defiance of authority is insubordination.

Provocation by a superior or the real or supposed existence of grievances is no justification for mutiny or insubordination, though such circumstances might be taken into consideration when determining the punishment.

*Sedition* is the same offence as that known in the ordinary criminal law, and consists of any conduct calculated to bring into contempt, or exciting disaffection against, the Sovereign, or the Government, or either House of Parliament, or the administration of justice.

**Man., III, 6.**

Everyone causing, or joining in, a mutiny or sedition, or being present and not using his utmost endeavours to suppress it, or coming to the knowledge of any actual or intended mutiny or sedition and not informing his superior Officer without delay, is liable to death.

s. 8.—*Striking, or using, or offering violence to a superior in the execution of his office.*—The offender is liable to death. The distinction between this sub-section and the next is the words, “in the execution of his office.” It is impossible to give a definition of this term which will meet all cases, and a Court would have to determine from their military knowledge whether, in any particular instance, the superior was in the execution of his office. The fact of an Officer being in plain clothes would not prevent his being in the execution of his office, if, for instance, he were ordering disorderly soldiers back to barracks; but it would be necessary to prove that there were reasonable grounds for the soldier knowing the person assaulted was an Officer. A Non-Commissioned Officer asleep in the barrack-room of which he had charge would probably be held to be within this sub-section. An Officer or Non-Commissioned Officer in barracks or quarters is in the execution of his office.

“Superior Officer.” It will, of course, be for the Court to recognize from their knowledge of military ranks whether the person assaulted is the superior of the accused, and this fact would not have to be proved, unless the person struck and the accused are of the same grade, when it will have to be proved that the person assaulted was senior to the accused in the rank, and that the latter knew it.

**O’Dowd, p. 15.**

The term "soldier" includes civilians subject to military law as such; they can therefore be charged under this or the following section. **s. 190 (6).**

Note that when troops become prisoners of war the ordinary military relations between superiors and subordinates and the duty of obedience remain unaltered, and any prisoner guilty of a breach of discipline will be liable to be dealt with for such, after release.

**K.R., 179.**

In charges against soldiers of the Militia or Territorial Army under this or the next section, it will be necessary to show that the "superior officer," as well as the accused, was subject to military law at the time.

The Matrons, Sisters, and Staff Nurses of the Military Nursing Service are not the "superior officers" of soldiers within the meaning of this or the next section, but it is laid down in the Regulations that as regards duties in connexion with the sick in hospitals they have authority next after the Medical Officers, and their orders are to be obeyed accordingly, and they are to receive the respect due to this position. Any breach of this regulation would be an offence under s. 40.

**A.M.R., 166.**

An Indian Officer or Non-Commissioned Officer is not the "superior officer" of a British soldier; a charge for insubordinate conduct towards them is to be laid under s. 40.

A British Warrant or Non-Commissioned Officer is the "superior officer" of such Indian ranks as have been placed under his orders. **I.A. Act, s. 7 (7).**

Gangers or foremen of native labour corps with troops on active service are not the "superior officers" of the coolies or labourers within the meaning of this or the next section; an offence against them must therefore be charged under s. 40. **R.P., 135 (c).**

"An offer of violence" is any defiant act or gesture which would, if completed, result in violence, *e.g.*,

**D 2**

throwing anything at the superior or pointing a loaded firearm at him ; but the term does not include any gesture, no matter how impertinent, which could not by any possibility produce violence, *e.g.*, shaking his fist from an upper window at a superior on the barrack square, or pointing an unloaded weapon at him. Mere words, no matter how threatening, would not constitute the offence.

Violence, or attempted violence, when in self-defence and necessary for actual protection from injury, is justifiable. Any provocation, though not exonerating from guilt, would tend to mitigate punishment.

**O'Dowd, p. 41.**

Charges under sub-sec. (1) should usually be reserved for trial by a General Court-Martial.

Sub-sec. (2) includes the foregoing offences against a superior not "in the execution of his office," and also *insubordinate or threatening language to a superior*.

The actual words or their substance must be proved. Language may be *threatening* even if it does not imply an intention to resort to violence, since threatening language denotes language conveying a threat of any kind. It has been held that insubordinate language regarding one superior if used to another (*i.e.*, with the intent that it should be heard by the latter) comes under this section. But expressions used (1) in the course of a judicial inquiry, (2) by a party to the case, (3) and pertinent to and *bona-fide* for the purposes of the inquiry, cannot be made the subject of a criminal charge, no matter how offensive to a superior. A soldier awarded a punishment by his Commanding Officer from which he thinks he has a right to claim trial by Court-Martial, who says "I won't do it," does not necessarily commit an offence under this section, if he merely wishes to appeal ; and a sensible Commanding Officer would not at once put the worst construction on his words, but would try to ascertain if he only meant to signify his wish for a Court-Martial. **O'Dowd, p. 44.**

Coarse or abusive expressions used by a drunken man should not, as a rule, be charged under this section ; and care should always be taken to discriminate between mere angry expressions used in a moment of irritation by a man of inferior education, and words indicating a deliberate insubordinate intent. Improper language, not amounting to insubordination, should be charged under s. 40. **Man. III, 30 ; V, 86.**

A man using violence to a superior accompanied by insubordinate language should only be charged with "using violence." The language used should be brought out in evidence to prove his intention of being insubordinate. **R.P., 11 (A), note 2.**

For offences under this sub-section an offender is liable to penal servitude on active service ; at other times, to cashiering or imprisonment.

It is unnecessary to frame alternative charges under subsecs. (1) and (2) for the same offence, as a person charged under subsec. (1) can be found guilty under subsec. (2), if the evidence does not warrant a conviction on the graver charge. **s. 56 (5).**

s. 9.—*Disobeying in such a manner as to show a wilful defiance of authority a lawful command given personally by a superior in the execution of his office.* The offender is liable to death. It must be proved

- (1) That the command was lawful ;
- (2) That it was given personally by a superior,
- (3) In the execution of his office, and
- (4) That it was disobeyed defiantly.

A "lawful command" means a command which not only is not contrary to the ordinary Civil Law, but one which is also justified by Military Law.

**Man. III, 10.**

Thus, for example, an Officer tells his soldier servant to bring round his horse from the stable. If the horse were his charger, and he required it for military duty, this would be a "lawful command" ; but if the Officer were in plain clothes and wanted the horse for hunting,

this would not be a "lawful command" within the meaning of the section.

**O'Dowd, p. 49.**

But so long as the orders of a superior are not obviously and decidedly in opposition to the well-known and established customs of the Army, or the laws of the land, or if in opposition to such laws do not tend to an irreparable result—so long must the orders of a superior meet with prompt, immediate, and unhesitating obedience.

**Simmons, p. 255.**

It is a "lawful command" to order an Officer to defend an accused person at a Court-Martial, but it would be undesirable to enforce such an order where the Officer had any reasonable ground for objecting to perform the duty.

It is not enough to allege a refusal to obey; it must be averred in the particulars of the charge and proved in evidence that the accused actually did not obey the order. The disobedience must refer to some command to be carried out at once. A man who, when ordered to perform some future duty, refuses, does not disobey, and if placed in arrest, must be charged under s. 8. Religious scruples furnish no excuse for disobedience. Physical impossibility to comply with the order, of course, furnishes an excuse for not obeying it. An omission to obey arising from misapprehension or forgetfulness is not an offence under this section.

A civilian official employed in a military office cannot give a military order to soldiers employed under him, and a man disobeying such an order does not commit an offence under this section, but if it were his duty to obey such order he could be charged under s. 40.

Charges under sub-sec. (1) should generally be reserved for trial by a General Court-Martial.

Sub-sec. (2) deals with disobedience of a command not necessarily given personally by the superior, and the manner of disobeying need not show wilful defiance. It will be sufficient if the command is given by an agent

of the superior, but it must be a specific order to an individual. In other respects, the notes to the foregoing sub-section apply also to this one. The offender is liable to penal servitude on active service; otherwise, cashiering or imprisonment.

It is unnecessary to frame alternative charges under subsecs. (1) and (2) in respect of the same act of disobedience, as if the evidence fails to support a charge laid under subsec. (1) the accused can be convicted under subsec. (2). **s. 56 (5).**

Disobedience of Standing Orders should be charged under s. 11.

s. 10.—*When engaged in a quarrel, etc., refusing to obey, or striking an Officer (although junior), who orders him into arrest.* A junior Officer has authority to order into arrest any Officer, even of higher rank, who is engaged in any quarrel, fray, or disorder. **s. 45 (3).**

If the Officer ordering the arrest were the superior, then to strike him or disobey him would be an offence under s. 8 or 9. Only Officers should be charged under this sub-section.

*Striking or offering violence to anyone, whether subject to military law or not, in whose custody he is placed.*—Striking a civilian policeman who had the offender in custody would come under this sub-section, provided the latter has been placed in custody by military authority.

*Resisting an escort.*—The resistance may be merely passive, as by lying down and refusing to move. Running away from an escort to prevent capture would also be within the sub-section. It has been held that threatening language and a threatening attitude which in fact deter an escort from arresting the accused amount to resistance. Breaking away from an escort is not in itself an offence under this sub-section, though it could be tried under s. 22. The particulars of the charge should specify the nature of the resistance. The escort must be a *military* escort, or a Naval or Air Force one which has authority to apprehend persons



subject to military law. A man in custody of the civil police could not be charged under this sub-section.

When a drunken soldier on being arrested strikes a Non-Commissioned Officer of the Military Police the Convening Officer should consider whether it will not be sufficient to charge him under one of these last two sub-sections instead of the graver offence under s. 8.

*Breaking out of barracks* is the offence of quitting barracks when a man has no right to do so, either because he is a defaulter, or on duty, or by the custom of the Service should not leave barracks (*e.g.*, between tattoo and *réveillé*). It is immaterial whether the offence was committed by violence or stratagem, or simply walking out of the gate unnoticed. "Breaking out of quarters" relates to the case of a man leaving one part of a barrack for another, where he had no right to be at the time.

**O'Dowd, p. 53.**

The fact that a man was a defaulter must be proved by a certified copy of the Guard Report or Minor Offence Report.

**K.R. 643.**

Only soldiers can be charged under this sub-section.

The penalty for any of the offences in this section is cashiering in the case of an Officer or imprisonment in the case of a soldier.

s. 11.—*Neglecting to obey general or other orders.*—"General orders" do not include Army Orders or the King's Regulations; but if any parts of such orders or regulations are re-published in garrison or regimental orders they become part of these latter orders, and disobedience will render the offender liable. All gambling in garrisons or camps, and the introduction of wines or spirits into barrack rooms, is forbidden by King's Regulations. If these prohibitions have been republished in regimental orders an offender should be charged under this section; if, however, they have not been so republished, any breach of the regulations must be dealt with under s. 40. **K.R., 517, 518.** Ignorance of a published order is no excuse, if it was the duty of the offender to know it. Soldiers are personally

responsible that they make themselves acquainted with orders and details for duty posted in quarters in accordance with regulations. **K.R., 488, 1290, 1675.** The publication of the order must be proved. A copy of the order must be produced by a witness on oath. Failure to comply with a verbal order is not an offence under this section, but should be charged under s. 9. This section does not include non-compliance, through forgetfulness, with an order to do something at a future date ; this would be charged under s. 40. Concealment of venereal disease is to be dealt with under this section and not under s. 18 (3) or s. 40, as there is an order in every unit directing men to report sick at once when suffering from this disease. **K.R., 520.** Penalty, cashiering or imprisonment.

#### DESERTION, FRAUDULENT ENLISTMENT, AND ABSENCE WITHOUT LEAVE.

s. 12.—*Desertion* is absence without leave with the intention of permanently quitting the Service, or of evading a particular important duty, such as embarkation with a draft, or going out in aid of the Civil Power.

**Man., III, 13, 16.**

The period the accused has been away, or the distance he has gone, or whether he is dressed in plain clothes or not, or whether he surrendered or was apprehended, are none of them facts which of themselves constitute the offence, though they would be taken into consideration by the Court in determining whether he were guilty of the offence of desertion or of absence without leave. The fact that he had committed a serious crime just previous to absenting himself would point to the probable intention of his remaining away to escape the consequences of that crime. The fact that a man surrenders is no proof that he originally intended to return ; he may for some reason have changed his mind. A soldier detailed in regimental

orders as a "waiting man" for a draft for service abroad is held to be "under orders for service abroad."

**Man., III, 14-19.**

A Marine who deserts while borne on the books of one of His Majesty's ships is not guilty of desertion under this Act, as he is not subject to military law.

**s. 179 (15).**

*Attempting to desert* is any act which is a prelude to desertion, although no actual absence can be proved, as if a soldier were caught in the act of slipping past a sentry or climbing over a barrack wall. **Man., III, 18.** A mere *intention* to desert does not amount to an attempt. **O'Dowd, p. 58.** To establish the offence some act must be proved which if completed would constitute desertion.

Whenever a soldier has been absent twenty-one days, a Court of Inquiry is to be assembled as soon as possible to inquire into and record the fact of his illegal absence and deficiency of kit, if any. The Court must not be assembled till after twenty-one clear days, exclusive of the day the absence began and the date of assembly. It is illegal if held after the absentee has returned, unless at the time the Court was held the Commanding Officer was unaware of his apprehension or surrender. This Court usually consists of three Officers, who are not themselves sworn, but take evidence on oath. The declaration of the Court should state the place and date of absence and of deficiency of kit (if any), and that the man is still so absent and the articles deficient. (*Vide* form given in note 3 to R.P. 125 (B).) Before declaring any deficiency the Court will take evidence that the man had the articles within a reasonable period of the deficiency. After this declaration that the man has been absent twenty-one days is confirmed by the Commanding Officer, it is recorded in A.B. 161, with the names of the members of the Court, and signed by the Commanding Officer and put away with the regimental records, and is equivalent to a conviction of desertion if the man does not return, and he is accordingly struck

off the strength as a deserter. If he rejoins he is tried for desertion, unless he can prove any facts showing that he intended all the time to return, in which case his offence would only be absence without leave.

**s. 72 and notes ; R.P., 125 and notes : K.R., 734, 1693.**

The record of the declaration of the Court of Inquiry, copied out on A.F. B 115, is used as evidence against him, and oral evidence of his absence is unnecessary unless the accused disputes the statements in the record. The signature of the Commanding Officer in A.F. B 115 is that of the Commanding Officer who signed the original record in A.B. 161, and not that of the accused's present Commanding Officer. A.F. B 115 must be certified as a true copy of the record by the Officer having custody of the same. **s. 163 (1) (h).** The accused must be identified as the person named in A.F. B 115.

The maximum penalty for any offence under this section is death, if committed on active service or under orders for active service ; otherwise, imprisonment for the first offence and penal servitude for the second or any subsequent offence. For the purposes of liability to the higher punishment, a previous conviction of fraudulent enlistment is considered as equivalent to a previous conviction of desertion.

A man convicted of desertion, or whose trial for this offence has been dispensed with by the competent military authority under s. 73, forfeits all his prior service towards limited engagement, and has to start his service afresh, like a recruit, from the date of conviction or of the order dispensing with trial.\* All variations of service, such as extension of service, are thereby cancelled. In the case of a man who has re-engaged, only the service on re-engagement, *i.e.*, after completion of 12 years, is forfeited.

**ss. 79, 84 (2) ; K.R., 237.**

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\* This does not apply to a marine, or to a man of the Territorial Army. **ss. 178, 179 (14).**

This forfeited service may be restored by the Army Council to any soldier who is recommended for such restoration by Court-Martial, or who may perform good and faithful service, or after he has served three years in an exemplary "manner," *i.e.*, without an entry in the Regimental Conduct Book, or on his promotion to Serjeant. In the last two cases the service is, if the man so elects, restored automatically by the Regulations now in force. **s. 79 ; K.R., 237, 547.**

**s. 13.**—*Fraudulent Enlistment* is the offence committed by a soldier of the Regular Forces, or soldier of the Territorial Army when embodied, who, without fulfilling the conditions enabling him to do so, enlists or enrolls in His Majesty's Regular Forces, or in any force raised in India or a colony ; or a soldier of the Regular Forces who enlists in the Territorial Army or any reserve forces, or the Air Force, or enters the Royal Navy.

**A.F. (Const.) Act, s. 7 ; T. A. & M. Act, s. 3.**

It will thus be seen that for a soldier to be guilty of fraudulent enlistment he must really be a deserter from another Regiment, as unless he is a soldier of the Regular Forces (or a soldier of the Territorial Army embodied) when he commits the offence, the unlawful enlistment is not within this section, but would come under s. 32 or 33. In trying a man, he is usually deemed to belong to the Corps in which he has last enlisted and is held to serve on his last attestation. **K.R., 587.** He is not, as a rule, also charged with the desertion from his former Regiment, as the fact of re-enlisting is generally taken as negating an intention to permanently quit the Service ; but where the first absence was to avoid an important duty, *e.g.*, to go to the trenches when on active service—then the man could properly be charged with desertion as well as the subsequent fraudulent enlistment.

It will be noted that the offence of an embodied Territorial enlisting into another unit of the Territorial

Army or into the Navy is not included ; this offence, therefore, must be charged under s. 33.

A certified true copy of the attestation paper is evidence of the man having enlisted as shown therein.

**s. 163 (1) (a).**

For the first offence the offender is liable to imprisonment, and for the second or any subsequent offence to penal servitude. For the purposes of liability to the higher punishment, a previous conviction of desertion (except the desertion immediately preceding the fraudulent enlistment), is considered as equivalent to a previous conviction of fraudulent enlistment.

The rules as to forfeiting service towards limited engagement, and its restoration, are the same as those stated above in the case of desertion.

**s. 79 ; K.R., 237.**

**s. 14.**—*Assisting a person to desert, or knowing of any intended desertion, not forthwith telling his superior officer or taking some steps to prevent it.*—Maximum penalty, imprisonment. A civilian who assists a deserter is liable to six months' imprisonment on summary conviction.

**s. 153.**

**s. 15.**—*Absence without leave* is reckoned to begin from the first roll call, or parade, or other duty, at which the absentee did not appear, and ends as soon as he returns or is apprehended. **K.R. 502.** Involuntary absence, as, for example, detention by the Civil Power, does not count as absence without leave. If the absence is proved, the onus will lie on the accused of showing that he had leave. An Officer or soldier has not leave until the fact that such leave has been granted is communicated to him by proper authority according to the custom of the Service, and if he goes away in anticipation of such leave he may be convicted of absence without leave notwithstanding that the leave has in fact been granted. When the absence is from some particular parade or duty, then it falls under subsec. (2), otherwise the offence will come under the

first sub-section. It must be proved that the place and time of the parade were appointed by the Commanding Officer, and that the accused had warning of them. A man absent without leave is not also liable to be tried for failing to appear at all the parades, etc., during his absence. If a man is found so drunk as to be incapable of attending parade, he should be charged under s. 19 instead of under this section. **Man., III, 31.** If a soldier on apprehension or surrendering himself as an absentee is taken into custody, his absence terminates then. **K.R., 563.** If, however, he is not taken into custody, but sent to his unit under K.R. 579, his absence continues until he arrives at the place where it is his duty to be.

When a unit or draft parades for embarkation, two or more senior Non-Commissioned Officers who are not going with it, will attend the parade to take a record of all absentees, in order to give evidence at their subsequent trial, if one takes place. **K.R., 1095.**

*Being found in a prohibited place or going beyond bounds.*—Ignorance of the order putting the place out of bounds, or fixing the bounds, is no excuse; but if the order is not clearly worded, then a mistake arising therefrom would excuse the soldier. The place in which the accused was found must be stated in the particulars of the charge, and proved in evidence to be that prohibited by the order. The order (or a certified copy) must be produced in evidence.

**O'Dowd, p. 64.**

*Absence from school.*—This offence and those mentioned in the last sub-section can only be committed by soldiers.

The maximum penalty for offences against this section is cashiering for an Officer or imprisonment for a soldier. As already noted, when dealing with punishments, the pay of an Officer may be forfeited for every day of absence without leave, **s. 137 (1); R.W. 434;** and in the case of soldiers, pay is forfeited for every such day of absence. **s. 138 (1); R.W. 856 (a).**

## DISGRACEFUL CONDUCT.

s. 16.—*Scandalous conduct, unbecoming the character of an Officer and a gentleman.*—Only an Officer can be tried under this section, and, if convicted, he *must* be cashiered, the Court having no discretion in the matter of punishment. The sentence cannot be commuted by the Confirming Officer. **s. 57 (1) (note 4).** In order to sustain a charge under this section, it must be shown that the conduct was not only prejudicial to good order and military discipline, but reflects such discredit upon the Service that the offender is unfit to remain connected with it. **O'Dowd, p. 66.** A mere allegation of drunkenness does not disclose an offence under this section.

Misconduct not coming within this section might be tried under s. 40.

s. 17.—*When charged with the care of money or goods, stealing, or fraudulently misapplying, or embezzling them, or conniving at such theft or embezzlement.*—Maximum penalty, penal servitude. Fraudulent misapplication means converting any of the things mentioned to the use or benefit of the accused or any person, other than those for whom he was entrusted. **Stephen, Crim., Art. 373.** This section differs from s. 18 (4) in that the offender is the person actually charged with the care or distribution of the property made away with, so that he is guilty of a breach of trust, and thus renders himself liable to the heavier punishment of penal servitude. The expression “charged with the care of” does not include a sentry posted over a building containing public property, but means the person must have been officially so charged as part of the duty of his office or employment. Hence a Corporal or Private entrusted with money by a Pay-Serjeant, for his own convenience, would not come within this section. The particulars of the charge should show how it was the duty of the accused to have charge of the property.



When a person is charged under this or the following section for deficiency in money or goods entrusted to him and there is doubt as to whether such deficiency is due to fraud or mere negligence, an alternative charge under s. 40 should be added. **K.R., 617.**

s. 18.—*Malingering or feigning disease.*—Malingering means a more serious case of feigning disease, implying some active deceit, such as taking a drug or doing something which would produce the appearance of the disease, for the purpose of avoiding military duty.

*Misconduct or disobedience producing disease or delaying its cure.*—The misconduct must be with the intent of producing or aggravating the disease, and does not include the involuntary production of disease by immoral conduct or intemperate habits, or refusal to undergo an operation. A soldier, who becomes unfit for duty through excessive indulgence in alcohol, can, however, be charged under s. 40. It has been ruled that a soldier refusing to be vaccinated or inoculated against enteric cannot be charged under this section, or for refusing to obey a lawful command under s. 9, even though he agreed on enlistment to undergo such treatment. A recruit, who, after attestation, refuses to be vaccinated is discharged. **K.R., 363 (xix).**

*Wilfully maiming himself or another soldier with intent to render himself or the other soldier unfit for service.*—"Maiming" in law means doing anything to a man whereby his fighting capacity is lessened.

**Harris, p. 174.**

It must be noticed with reference to all the three foregoing offences that whenever medical evidence is required in support of the charge, the Medical Officer or doctor must attend and give oral evidence, a medical certificate or sick report is *not* admissible and would be excluded as "hearsay" (*vide infra*, p. 170).

*Stealing (or Theft)* is the wilfully, wrongful taking possession of the money or goods of another with intent to deprive the owner of his property in them.

**Man., VII, 56 ; Harris, p. 191.** This wrongful intent, or *animus furandi*, must be present at the time of taking ; if there is evidence from which the Court can infer this, the mere fact that the accused subsequently returned the goods will not purge the offence.

**Denman, p. 26.**

*Embezzlement* is the unlawful appropriation to his own use, by a servant or a clerk, of money or chattels received by him, for and on account of his master or employer. **Man., VII, 59 ; Harris, p. 222.** It has been held by a majority of the Judges that a charge of embezzlement may be supported by proof of a general deficiency of money that ought to be forthcoming without showing any particular sum received and not accounted for.

**Denman, p. 288.**

The legal distinction between these two offences is highly technical, and for all practical purposes might be abolished. It largely depends on the difference in law between the two terms, *custody* and *possession*. Thus, if a master gives his plate to his butler to take care of, the latter has the *custody* of the plate, but the *possession* of it is in the master, and if the butler makes away with it he *steals* it. If, however, the master sends his butler to the silversmith's to fetch plate which he has bought, and the silversmith delivers the plate to the butler for his master, the plate is now in the *possession* of the butler, and has not yet come into the master's *possession* until the servant either hands it over to him or puts it with the other plate in the pantry, so that if on the way home he makes away with it, he *embezzles* it. **Stephen, Crim., Art. 306, 323.**

One other example may, perhaps, help to make the difference clear. A clerk receives £20 from a person for goods sold for his master ; he at once pockets it, appropriating it to his own use ; this is *embezzlement*—the money has never got into the master's *possession*. On the other hand, if the clerk puts the £20 in the till, and then after the customer has gone, takes it for his

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own use, this is *stealing*—when the money was put in the till it came into the constructive *possession* of the master. **Harris, p. 190.**

The possession of recently stolen property is evidence that the person in whose possession it is found stole it, or throws on him the onus of proving that he got it honestly. This presumption of guilt will naturally vary according to the nature of the property, and whether it is or is not likely to pass readily from hand to hand. Where the accused was found in recent possession of stolen property, of which he could give no satisfactory account; and it might reasonably be inferred from the circumstances that he was not the thief, it was held there was evidence that he received it knowing it to have been stolen. **Denman, p. 520.**

In a case of *receiving*, guilty knowledge is proved either by the direct evidence of the thief, or circumstantially by proving the accused bought the goods very much below their value, or denied possession, or the like. But where the only evidence against the alleged receiver is that of the thief, the Court should acquit. Where stolen property is found in a man's house it is a question of fact for the Court whether it was there with his knowledge and sanction.

**Denman, pp. 518, 519.**

It must be observed that to bring the offence within this section the money or goods made away with must belong to an Officer or comrade, or some regimental institution, or the Navy, Army, and Air Force Institutes. **A. & A.F. (Ann.) Act, 1921, s. 5.** If they are not either "public" or "military" property as above, the offence does not come under this section, but falls under s. 41 (5), which deals with offences against the ordinary criminal law. A sailor of the Royal Navy or an airman is not a "comrade" unless there are special circumstances which would make him one. The property of a garrison mess or institution, or of a branch of the Royal Army Temperance Association, is not included in the term "regimental property," as

the expression "regimental" is defined as meaning connected with a corps, or battalion, or other subdivision of a corps. **s. 190 (17)**. It has been held that goods the property of a Divisional canteen are not "public" goods. A man charged with stealing goods belonging to a regimental mess cannot be convicted of stealing public goods.

The offence of theft from a comrade should be tried by Court-Martial, and not by Civil Court, unless there are peculiarly complicated circumstances connected with the case. **K.R., 616.**

The term "money" includes coin, bank notes or currency notes; money orders and postal orders are not "money" but "valuable securities" and should be described as "goods." **Denman, pp. 398, 399.**

The values of the articles stolen or received in respect of which it is desired the accused should be put under stoppages, must be stated in the particulars of the charge, **R.P. 11 (F)**; but except for the purposes of stoppages, it is unnecessary to state value except where it is of the essence of the offence in some cases under the Larceny Act, which would be charged under s. 41 (*vide infra*). **Denman, p. 623.** The ownership should be stated and proved, when the offence is charged under this section; it is not necessary to state the ownership when the offence is charged under s. 41, except under special circumstances. **5 & 6 Geo. V, c. 90, First Sch (1)**. It must be noted that the ownership cannot be laid in a deceased person. Theft of goods the property of different owners must not be induced in the same charge, **R.P. 11 (A), note 2**; nor must distinct takings on different dates of the property of the same owner. **Denman, p. 205.** The goods must, if possible, be produced in Court and identified, or the reason for their non-production explained.

Sub-sec. (5) deals with all other offences of a fraudulent nature, not being stealing or embezzling, and with any disgraceful conduct of a cruel, indecent, or unnatural kind.

Cruelty usually implies some positive act, such as beating or torturing ; but there are circumstances in which cruelty can be charged against a person who has culpably failed to do what he ought to have done. Where a definite duty is imposed on a person to relieve suffering, and he fails to perform that duty in callous disregard of the dictates of humanity and knowing that his failure must inevitably prolong or intensify suffering, he can be held to have committed an act of cruelty.

Offences of indecent conduct towards children and young females should be charged under s. 41, and not under this sub-section. In cases of offences against children, where it is necessary to prove the age of the child, this is best done by the production of a certified copy of the entry in the Register of Births, coupled with identification of the child with that named in the certificate. But this mode of proof does not exclude evidence of age by persons who know the child. The evidence of the mother, no matter how confused, has been held sufficient. **Denman, p. 18.** In cases of rape, or kindred assaults on children or young persons, or of indecent crimes on male persons, corroboration is very desirable, if not in law absolutely necessary ; and in the last case the accused should not be convicted on the unsupported evidence of the other man.

**Denman, p. 147.**

At home, the charge-sheet and summary of evidence in all cases of fraud are to be submitted before trial to the Judge Advocate-General. Simple cases of theft are not included. **K.R., 621.** A similar rule exists in India.

**A.R.I., Vol. II, 255.**

A charge of disgraceful conduct must show that the conduct was palpably "disgraceful." Only soldiers can be tried under this section. Maximum penalty, imprisonment.

#### DRUNKENNESS.

s. 19.—*Drunkenness, whether on or off duty*, renders an Officer liable to be cashiered ; and a soldier to imprisonment, and, either in addition to, or in sub-

stitution for, any other punishment, a fine not exceeding five pounds. Where the offence is committed by a soldier not on active service or on duty the maximum punishment is six months' detention, with or without a fine. **A. & A.F. (Ann.) Act, 1921, s. 6 (1).** The case of a sentry drunk on his post has already been considered under s. 6.

It should be noted that the distinction between drunkenness on duty or not on duty has been done away with, and the charge is now in any case, *drunkenness*. If the offence was committed on duty, or when warned for duty, the fact that the offence was so committed and the nature of the duty should be stated in the statement of particulars of the charge. The terms "aggravated" and "simple" drunkenness have been abolished.

Drunkenness includes intoxication from the effects of opium or any similar drug, as well as from liquor.

**Man., III, 25.**

It is a principle of law that drunkenness is no excuse for a crime; but where *intention* is the essence of the offence charged, and it is proved that the accused was drunk, this fact might justify the Court in awarding a less punishment, or might reduce the offence to one of a less serious nature.

**Man. III, 31.**

#### OFFENCES IN RELATION TO PERSONS IN CUSTODY.

s. 20.—*Releasing a person in custody without due authority, or allowing him to escape.*—If the offender acted *wilfully*, the maximum penalty is penal servitude; if *negligently*, imprisonment. It will be for the accused to show that he acted under due authority. If an escort of a Non-Commissioned Officer and a private lose the soldier in their custody, the blame will primarily rest on the Non-Commissioned Officer unless it can be proved that the private shared in allowing the

escape to take place, or unless the Non-Commissioned Officer shows that he had good grounds for temporarily leaving the soldier in the care of the private.

s. 21.—This section deals with various breaches of the law laid down for preventing a person in custody being unduly kept in confinement without having his case disposed of. The maximum punishment is cashiering or imprisonment.

Anyone committing a soldier into custody must give in, either at the time or within twenty-four hours, a written account, termed "the charge," to the person in whose custody he is placed. **s. 45 (4) and note.**

The Commander of the Guard must enter the names of all soldiers in arrest in his Guard Report, which he must send in as soon as his guard is relieved, or in any case within twenty-four hours of the soldier being confined. **s. 21 (3) ; K.R., 521.**

A Commanding Officer must investigate all charges within forty-eight hours of their being notified to him, or must report not doing so, with his reasons, to the General or other Officer to whom application for a Court-Martial would be made. **R.P. 2.**

If eight days elapse without the case being disposed of summarily or a Court-Martial being ordered, a special report must be made to the General Officer Commanding, and repeated every eight days, except on active service. **s. 45 (1) ; R.P. 1.**

If more than fifteen days in the United Kingdom, or thirty days elsewhere, elapse between the receipt of an application for a General Court-Martial or a District Court-Martial, or to deal summarily with an Officer, and the disposal of the case, either by the assembly of such a Court or otherwise, the General Officer must report the circumstances to higher authority or to the Army Council, or, in India to the Commander-in-Chief in India. **R.P. 17 (c) ; A.O.  $\frac{7}{2}$   $\frac{5}{1}$ .**

s. 22.—*Escaping from lawful custody, or attempting to do so.*—The “lawful custody” must be described when not one of those mentioned in the statement of offence given for an offence under this section in R.P., App. I. **R.P., App. I, 11.** A soldier in arrest escapes when he unlawfully goes beyond the control of the person in whose custody he is placed. The escape may be either with or without force or artifice, and with or without the connivance of the custodian. A soldier in arrest finding the door of his cell open, and walking out of the prison, is guilty of an escape; but if a soldier, undergoing imprisonment, is working outside the confines of the prison and is not under the supervision of a warder or other custodian, and goes away, this is not an offence under this section. **O’Dowd, p. 77.**

An Officer or Non-Commissioned Officer “breaking his arrest” commits an offence against this section. It has been ruled that an absentee who had been arrested by a naval picquet and escaped could be convicted under this section, although not arrested by the military power, as under s. 154 (1) anyone has authority to arrest a person reasonably suspected of being a deserter or absentee. The maximum penalty is cashiering or imprisonment.

#### OFFENCES IN RELATION TO PROPERTY.

s. 23 is concerned with corrupt dealings in respect of supplies for the troops, the penalty being imprisonment.

s. 24.—*Making away with, or losing by neglect, articles of kit, etc.*—In a charge for “making away with,” it must be stated whether they were sold, pawned, etc., and in the absence of proof of such selling or pawning, the charge must be for “losing by neglect.”

**K.R., 623.**

The date on which the inventory was taken is the date that should be assigned for a charge of losing by neglect.

**R.P. 125, note 3.**



Unless A.F. B 115 is to be produced in evidence, it must be proved that the articles deficient were actually issued to the soldier, and the onus of showing that the loss has not occurred through his neglect will then rest on him. **Man., p. 704.**

“Equipments” are defined to include “every article issued to a soldier for *his* use, or entrusted to his care for military purposes,” hence it will include such things as blankets and barrack furniture, when in his personal charge. The articles must have been issued to the man for his personal use and do not include money or goods entrusted to him for custody, or those issued for general use of a party of men. **O’Dowd, p. 80.**

“Decoration” includes any medal, clasp, good conduct badge, or decoration. **s. 190 (18).** It must be carefully noted that there is nothing in the section which makes it an offence to lose by neglect a decoration.

The steps to be taken when a soldier is discovered to be deficient of his medals are laid down in K.R., para. 1007.

*Wilfully injuring property.*—The property must be public property, or belong to an Officer or comrade, or to some regimental institution, to bring the offence within this section. Injuring the private property of civilians would come under s. 41 (5).

*Ill-treating any horse or other animal used in the public service.*—A soldier-groom ill-treating an Officer’s charger commits this offence, but if the horse were not used for military duty at all no offence would be committed against this section, though the man could be tried under s. 41 (5). **O’Dowd, p. 82.** “Horse” includes mule, or other beast of burden or draught. **s. 190 (40).** And as in all Acts of Parliament masculine words include the feminine, it, of course, includes “mare.” **52 & 53 Vict., c. 63, s. 1.**

Only soldiers can be tried under this section, and the maximum punishment is imprisonment.

## OFFENCES IN RELATION TO FALSE DOCUMENTS AND STATEMENTS.

s. 25 deals with falsifying official documents and making false declarations, the punishment for which is imprisonment. A trivial error in a report should not, in the absence of fraud, be made the ground of a charge under this section. It is essential to prove an intent to defraud someone, but it is not necessary to show who the particular person was or whether it was the Government. "False declaration" in sub-sec. (3) relates to those made by Paymasters and others in a fiduciary position, but does not include statements in a summary of evidence or verbal reports or statements.

**O'Dowd, p. 83.**

To *deceive* is to induce a man to believe a thing is true which is false, and which the person practising the deceit knows, or believes, to be false. To *defraud* is to deprive by deceit, or to induce a man to act to his injury.

**Denman, p. 174.**

s. 26 makes it an offence to sign any document in blank or to neglect to send in any reports or returns. The neglect must be culpable, something more than mere carelessness. The punishment is cashiering or imprisonment.

s. 27.—*Making a false accusation against an Officer or soldier, or a false statement affecting his character*—The accusation mentioned in sub-sec. (1) must be an accusation and not a mere statement. A statement made by an accused in his defence, even though false, is not an offence. It is not an offence under this section to make a complaint, even though it be false or frivolous, unless it affects the character of some other Officer or soldier; but a continuance of making the same or similar frivolous complaints might constitute an offence under s. 40. **O'Dowd, pp. 85, 86.** A false statement about an Officer made in a private letter to a civilian friend has been held not to be an offence under this section.

*Falsely confessing desertion or fraudulent enlistment, etc.*—This offence can only be committed by a soldier. The statement must be made to the Commanding Officer, *i.e.*, the Officer whose duty it would be to deal with such a charge according to the definition of Commanding Officer given in R.P., 129. A written statement made for the purpose of being laid before the Commanding Officer is a statement to him.

*Making a false statement in respect of prolongation of furlough.*—This offence can only be committed by a soldier. When a soldier, by reason of sickness or other unforeseen casualty, finds it necessary to obtain an extension of furlough, he must go to any General or Staff Officer, or to any Commanding Officer not under the rank of captain, or if none of these is within convenient distance, to any Justice of the Peace, any of whom are empowered to extend his furlough for any period not exceeding one month, reporting to the man's Commanding Officer that this has been done. The Commanding Officer can cancel the extension, but the man cannot be punished as an absentee if he rejoins at once, or for having obtained the extension, unless he obtained it by making a *false* statement to the Officer or Justice. **s. 173 ; K.R., 1591.** It has been ruled that where a man made a false statement to his Commanding Officer *after* he rejoined his unit, as an excuse for absence, it was not an offence under this section.

The punishment for offences against this section is imprisonment.

#### OFFENCES IN RELATION TO COURT-MARTIAL.

s. 28 deals with the offences of a witness refusing to attend, or to give evidence, and with contempt of Court.

Military witnesses are ordered by their Commanding Officer to attend, **s. 125 (1)** ; the rules as to their being sworn, and the questions they are legally required to

answer, will be considered in the Chapter on Evidence. Offences under this section are not triable by the Court in connexion with which they took place. The punishment is cashiering or imprisonment. In the case of contempt of Court, by using insulting language or interrupting the proceedings, the Court may, if they think fit, sentence the offender summarily by order, under the hand of the President, to be imprisoned, or if a soldier to undergo detention for any period not exceeding twenty-one days. (For Form of Order *vide* Manual, p. 720.) This applies to an Officer, who could be thus punished by a District Court-Martial for such contempt. The order does not require confirmation, and the Confirming Officer has no power to interfere with the award ; though he or any other authority can exercise his power of release under s. 57 (2). The imprisonment or detention must be carried out at once, and therefore, if the offender is the accused, the Court must adjourn until the end of the imprisonment. It would only be in extreme cases that this power would be used ; it is more usual for the President to report the contempt to the proper authority, and allow the case to be dealt with by another Court if necessary ; or the Court may accept an apology sufficient to vindicate their dignity.

Contempt of Court by a civilian is dealt with in s. 126 or by a counsel in s. 129.

s. 29.—*Giving false evidence when examined on oath.*—This offence is similar to the offence of perjury at civil law, but it has even a wider application ; for in perjury it is necessary to prove that the matter falsely sworn to was *material* to the point in issue, **Harris, p. 66** ; whereas, to bring the case within this section, the false swearing need not be material, though of course in practice, if it is very trivial, it would hardly form the basis of a charge. It is necessary to prove—

- (1) That the accused was sworn (or made a solemn declaration) ;

- (2) That he swore as stated ; this must be proved by the evidence of the Officer who recorded the evidence, or by some person who actually heard him give evidence ; the mere production of the former Proceedings is not enough ;
- (3) That the evidence was false ; one witness, unless corroborated in some material point, is not enough for this ; and
- (4) Some fact showing the false swearing was wilful, *i.e.*, that the accused did not believe, or was not ignorant of the falseness of, what he stated.

If the Proceedings are produced they must be produced by an Officer having lawful custody of them.

**s. 165.**

Even if the statement be literally true, yet, if it is calculated to create a false impression and is made for that purpose, it is within the section.

**O'Dowd, p. 89 *et seq.***

The punishment for this offence is imprisonment.

#### OFFENCES IN RELATION TO BILLETING.

s. 30.—This section deals with various offences, such as doing violence to a person on whom billeted, or failing to pay for billets, or unlawfully demanding billets, etc. The punishment is cashiering or imprisonment. Or the offender may be dealt with by a Court of Summary Jurisdiction, and is liable to a fine not exceeding £50.

**s. 111.**

#### OFFENCES IN RELATION TO IMPRESSMENT OF CARRIAGES.

s. 31—This section deals with various offences, unlawfully demanding carriages, etc., or failing to pay for them, or making them travel beyond the legal distance, or carry stores not entitled to be carried, or ill-

treating the owners, etc. The punishment is cashiering or imprisonment. Or the offender may be dealt with by a Court of Summary Jurisdiction, and is liable to a fine not exceeding £50 and not less than 40s.

**s. 118.**

#### OFFENCES IN RELATION TO ENLISTMENT.

**s. 32.**—*Enlisting after having been discharged with disgrace from any part of the military or air forces, or after having been dismissed with disgrace from the Navy.* This offence can, of course, only be committed by a soldier, as an Officer does not “enlist.” The term “discharged with disgrace” means :—

- (1) Discharged with ignominy, *i.e.*, by sentence of Court-Martial.
- (2) Discharged as incorrigible and worthless.\*
- (3) Discharged for misconduct.
- (4) Discharged on account of a conviction for felony, *i.e.*, by the Civil Power. All offences against the ordinary criminal law are either felonies or misdemeanours; the distinction is somewhat arbitrary. **Harris, p. 6** ; or
- (5) Discharged on account of a sentence of penal servitude.

Men dismissed from the Navy for any reason except “with disgrace” cannot be charged under this section.

Proof of the discharge with disgrace must be given in evidence, either by production of the proper documents with proof of the identity of the accused as the person named therein or by the evidence of a witness with *personal* knowledge of the fact.

**O’Dowd, p. 92.**

A certified true copy of the attestation paper is evidence of the man having enlisted as shown therein ; but to prove that he denied his previous service one of the two original attestation papers is necessary.

**s. 163 (1) (a) ; O’Dowd, p. 92.**

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\* This is no longer a cause of discharge under K.R. 363.

The punishment is imprisonment.

s. 33.—*False answer on attestation.*—This includes any false answer, but if the offence amounts to fraudulent enlistment, or to an offence against the last section, the soldier is charged under those sections respectively instead of under this one. A false answer as to name or age would not usually form the subject of a charge. Provision is made in the King's Regulations for a soldier who has enlisted under an assumed name to have his true name added to his documents as an *alias*, **K.R., 1685**, and for a soldier who has enlisted under age to be discharged. **K.R., 363** (v.). An Officer duly authorized to attest recruits is a "Justice" for the purpose of this section. **s. 94.** To prove an offence under this section, one of the two original attestation papers must be produced in evidence to show the answers the man actually gave on being attested. **s. 163 (1) (a).** The falsehood of the answers may be proved either by the oral evidence of witness with a *personal* knowledge of the facts, or by the production of the proper documents, together with proof of the identity of the accused as the person named in them. **O'Dowd, p. 94.** Men of the Army Reserve improperly enlisting are tried under this section, and then relegated to the Reserve. **K.R., 584** (iii.). If it is intended that a soldier shall be retained in the Service, he is tried by Court-Martial under this section; if it is intended that he shall be discharged, he is tried under s. 99 by the Civil Power; but proceedings cannot be taken before the Civil Power if more than six months have elapsed since the commission of the offence. **K.R., 584** (v.), **586; 11 & 12 Vict., c. 43, s. 11.** The punishment under this section is imprisonment.

s. 34 deals with general offences in connexion with enlistment, *e.g.*, a recruiter conniving at a recruit making a false answer on attestation. The punishment is imprisonment.

## MISCELLANEOUS MILITARY OFFENCES.

s. 35.—*Using disloyal words regarding the Sovereign.*  
—Happily this is not an offence likely to occur, for whatever faults we may have in the Army, we cannot be accused of disloyalty. Should a case occur, the intention must be shown, for a man uttering mere violent or vulgar language while under the influence of liquor would not fall within this section. The words used must be set out in the particulars of the charge; they may be either spoken or written. The punishment is cashiering or imprisonment.

s. 36.—*Making injurious disclosures as to the Forces.*  
—This offence would usually, though not necessarily always, be committed on active service. It principally relates to persons under military law, who are newspaper correspondents; but injurious disclosures, even in private letters, may render an Officer or soldier liable. **K.R., 509.** The unauthorized communication of intelligence to the enemy falls within s. 5 (4). The particulars must show that injurious effects were produced. The punishment under this section is cashiering or imprisonment.

s. 37.—*Striking a soldier, or unlawfully detaining pay.*—This offence can only be committed by an Officer or a Non-Commissioned Officer.\* One private soldier striking another would be charged under s. 40. The word “soldier” includes a Non-Commissioned Officer. **s. 190 (6).** Hence a senior Non-Commissioned Officer striking a junior comes within this section; if a junior strikes a senior it comes under s. 8. The “ill-treatment” must be physical ill-treatment. **O’Dowd, p. 98.** Pay can only be withheld in accordance with the provisions of a Royal Warrant or Army Council’s instructions, framed in accordance with ss. 136, 137, 138, and 145.

s. 38.—*Duelling* is prohibited in accordance with the ordinary law. If a duel takes place and death ensues, the surviving principal and both seconds are guilty

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\* Includes a Warrant Officer, s. 132.



of murder. An Officer carrying a challenge comes within this section. A fight, other than with deadly weapons, is not a duel. "Conniving" means having a knowledge of and not disclosing the fact to a proper authority,  
**O'Dowd, p. 99.**

*Attempting to commit suicide* is prohibited in accordance with the ordinary law. The punishment for offences against this section is cashiering or imprisonment. A person aiding another to commit suicide would be an accessory before the fact or a principal in the second degree to murder.

**Stephen, Crim., Art. 248.**

s. 39.—*Refusing to hand over to the Civil Power soldiers accused of civil offences.*—A soldier accused of a crime against the criminal law can be arrested by the Civil Power, s. 144; and his Commanding Officer must hand him over to a constable having a warrant for his apprehension, but he may demand to see the warrant first. The punishment is cashiering or imprisonment.

s. 40.—*Conduct to the prejudice of good order and military discipline.*—For conduct or neglect to come under this section it must be such as is clearly prejudicial to military discipline, and not merely of a social kind, though sometimes the place and circumstances in which the offence was committed will bring it within the section. "Neglect" must be culpable and not due to misapprehension or inadvertence. Negligence has been defined by a high judicial authority as "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." Attempts to commit most of the military offences, except such as are specially legislated for (e.g., attempting to desert, s. 12; attempting to escape, s. 22; attempting to commit suicide, s. 38), would fall within this section. An attempt to commit an offence is an act done, or omitted, with intent to

commit the offence, forming part of the series of acts or omissions, which would have constituted the offence if such series had not been interrupted. To constitute an attempt the act done must be immediately connected with the commission of the offence.

**Denman, pp. 45, 46.**

It must be carefully noted that no crime which is an offence against any other section of the Act is to be charged under this one ; but a conviction would not be invalid merely because it is in contravention of this proviso, provided no injustice is done to the accused. Punishment : cashiering or imprisonment.

The practice, which crept in during the late war, of framing an alternative charge under this section in respect of an offence charged under another section is to be deprecated.

An Officer in civil employment cannot be tried under this section for neglect of duty in his civil capacity, but must be disposed of departmentally by the Civil and not by the Military Authority.

#### OFFENCES PUNISHABLE BY ORDINARY LAW.

s. 41.—While saving the power of the Civil Courts to deal with any Officer or soldier who commits an offence against the ordinary law, this section makes all civil offences, when committed by persons subject to military law, offences against the Army Act. and allows these offences (with certain exceptions) to be tried by Court-Martial. The exceptions are treason, murder, manslaughter, treason felony, and rape ; these five offences can never be tried by Court-Martial (except a Field General Court-Martial, **s. 49 (3)**), when committed in the United Kingdom ; or elsewhere in the King's Dominions, except Gibraltar, unless committed on active service, or a hundred miles away (measured in a straight line) from a competent Civil Court. It should be averred in the charge and proved in evidence that such is the case.

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*Treason*.—After many extensions of the meaning of this crime in the despotic times of the Tudors, the law has been settled that only those offences named in the Statute of Treasons, 25 Edward III, st. 5, c. 2, are now included, of which the chief are : imagining the Sovereign's death or that of the heir to the Throne, levying war against the Sovereign in any of his Dominions, aiding the enemies of the Sovereign, etc. Treason must be proved by some overt act ; spoken words do not alone constitute the offence, but the writing of such words is an overt act. **Stephen, Crim., Arts. 52—58.** Punishment : death.

*Murder* is unlawful homicide with malice aforethought. **Stephen, Crim., Art. 244.** Malice is presumed where any wrongful act is done intentionally, without just cause or excuse ; therefore the law presumes every homicide to be murder until the contrary appears. **Denman, pp. 381, 382.** To make the killing murder, the death must follow within a year and a day after the stroke or other cause. **Harris, p. 146.** Punishment : death ; no alternative mentioned.

*Manslaughter* is unlawful homicide without malice aforethought ; but whenever one person is killed by another, the law always presumes murder, and the burden of proving extenuation or justification lies upon the accused. **Stephen, Crim., Arts. 244, 251.**

*Treason Felony*.—Certain offences which had been declared treason, were, by an Act of the late Queen's reign (11 & 12 Vict., c. 12), made felonies, and are now usually tried as treason felonies under this Statute. Such are : an intention to deprive the King of his Crown or Royal dignity ; to levy war on him to force him to change his measures, or to put constraint on either House of Parliament ; or to stir up foreigners to invade the Realm or the King's Dominions. **Stephen, Crim., Art. 63.**

*Rape* is the act of having carnal knowledge of a woman without her conscious permission ; such permission not having been extorted through fear of

death or bodily harm. **Stephen, Crim., Art. 270.** Corroboration of the evidence of the woman, though not in law essential, is always required. **Denman, p. 515.** Evidence can be given to show the bad character of the woman for want of chastity, or that she is a common prostitute ; or the accused may prove she had connexion with him before, but not that she has had connexion with others. This evidence is given to try to prove " consent."

**Cockle, p. 112 ; Denman, p. 514.**

The punishment for any one of the last three offences is penal servitude.

All other offences against the ordinary criminal law can be punished in the same way as if tried by a Civil Court, or may be punished by cashiering or imprisonment. As to the punishments which can be awarded for civil offences *vide* the Table given in " Manual of Military Law," pp. 110-119.

It may be useful to add a few notes about those civil offences, which are most likely to be dealt with by Courts-Martial, to enable the members to appreciate the legal points which must be borne in mind.

*Burglary* is the breaking and entering the dwelling-house of another by night with intent to commit a felony therein. **Lar. Act, s. 15 ; Stephen, Crim., Art. 342.** It is important to notice five points necessary to constitute this offence. (1) It must be *by night, i.e.,* between 9 p.m. and 6 a.m. the next morning, **Lar. Act, s. 46 (1) ;** (2) the house must be a *dwelling-house*, where the owner or his servant sleeps, and the building must be a permanent structure, hence a tent or marquee is not included, **Stephen, Crim., Art. 341 ;** (3) there must be *breaking* either actual or constructive, this includes opening a closed door or lifting a closed window or flap to a cellar, but not raising a window which is already partly open, **Stephen, Crim., Art. 341 ; Denman, p. 86 ;** (4) there must be an *entry* even to the smallest degree of some part of the body or an instrument held in the hand, either to threaten

any person in the house or to remove any goods, but this does not include the intrusion of any instrument used for the breaking, **Stephen, Crim., Art. 341 ; Denman, p. 86 ;** (5) there must be an intent to commit a felony, which must be proved by the actual commission, or implied by some overt act.

**Harris, p. 245 ; Denman, p. 87.**

*House-breaking* differs from burglary in that it can be committed by *day*, and extends to schools, shops, warehouses, etc., as well as to dwelling-houses.

**Lar. Act, ss. 26, 27 ; Stephen, Crim., Art. 343 ; Denman, p. 311.**

*Robbery* is the forcible taking property from the person, or the immediate presence, of another against his will, by actual violence used to overcome resistance, or putting him to fear by threats to his person, property, or reputation.

**Stephen, Crim., Art. 322.**

*False Pretences*—It is an offence to obtain by any false pretence any goods, money, or valuable security with intent to defraud. **Lar. Act, s. 32 ; Stephen, Crim., Art. 358.** The false pretence must relate to a pretended *existing* fact and not a promise as to the future, and must be a definite misstatement, not a mere exaggeration. The false representation may be made orally, or in writing, or by conduct, *e.g.* a private soldier wearing officer's uniform and thus obtaining credit. **Stephens, Crim., Art. 359 ; Denman, pp. 238 et seq.**

*Forgery* is the making of a false document in order that it may be used as genuine with intent to defraud. **For. Act, s. 1 (1).** A document is false if it purports to be made by, or on behalf of, a person who did not make or authorize it, or if any material alteration has been made by addition or erasure, or if the whole or a material part purports to be made by a fictitious or deceased person. **For. Act, s. 1 (2).** Except in the case of forgery of certain documents mentioned in the Forgery Act, or of public documents, there must be an intent to *defraud*, and an intent to *deceive* is not

sufficient ; but it is not necessary to prove an intent to defraud any particular person. **Denman, p. 340.** It is advisable to add a second charge of “*knowingly uttering the forged document,*” so that if the prosecution fail to prove the actual forgery, the accused can, if he used the document, be convicted of this offence. A person *utters* a forged document, who knowing it to be forged, uses or offers it for any purpose, or tenders it in payment or exchange. **For. Act, s. 6 (2).**

*Carnally knowing a girl under 13 years of age.*—The age of the child must be stated in the charge and proved in evidence, as presumption as to age does not apply in the case of offences under the Criminal Law Amendment Act. **Child. Act, s. 123 (2).** The child, if too young to be sworn, can still give evidence, if in the opinion of the Court she is sufficiently intelligent and understands the duty of speaking the truth ; but the accused cannot be convicted unless this evidence is corroborated by other material evidence implicating him. **Child. Act, s. 30.** It is immaterial whether the child consented or not ; but if she did not, the accused could be charged with rape.

*Carnally knowing a girl between 13 and 16 years of age.*—No prosecution for this offence can take place after six months after the commission of the offence. **4 Edw. VII, c. 15, s. 27.** As in the case of a child under thirteen, it must be stated in the charge and proved in evidence that the girl was over thirteen and under sixteen. **Denman, p. 90.** It is a sufficient defence if it appears to the Court that the accused had reasonable cause to believe the girl was over sixteen. **Stephen, Crim., Art. 273.** It is no defence that the girl consented.

*Indecent Assault.*—In the case of children under thirteen, the law as to stating and proving the age of the child, and as to consent being no defence, and as to the reception of the unsworn evidence of the child, is the same as that above stated. **Denman, p. 322.**

An *Assault* includes an attempt unlawfully to apply the least force to the person of another, or using any

gesture towards another giving him reasonable grounds to believe such actual force is intended, without the lawful consent of the person assaulted. No mere words can ever amount to an assault. Acts reasonably necessary for the ordinary intercourse of life are not assaults if done for such purpose and with no greater force than occasion requires. **Stephen, Crim., Art. 262.**

*A Battery* is an assault whereby the least actual force is applied to the person of another.

**Stephen, Crim., Art. 262.**

A conviction by Court-Martial of an offence under this section, even though the crime is treason or a felony in the civil criminal code, does not entail any of the forfeitures which would be consequential on a conviction by a Civil Criminal Court.

**Clode, Mil. Law, p. 168.**

When any person has been acquitted or convicted by a Civil Court of any offence, he cannot be dealt with under military law in respect of the same offence.

**s. 162 (6).**

## CHAPTER V

### ARREST OF OFFENDERS AND INVESTIGATION OF CHARGES

#### ARREST AND CONFINEMENT

WHEN a person subject to military law commits an offence, he may be taken into military custody. **s. 45 (1).** Military Custody means, in the case of an Officer, Warrant Officer, or Non-Commissioned Officer, usually arrest, but if necessary, any of them may be placed under charge of a guard, picquet, etc, **K.R., 523** ; in the case of a private soldier, it means either placing him in open arrest, or putting him in confinement under charge of a guard, picquet, etc. **s. 45 (2) ; K.R., 529.**

A junior Officer may order a senior into arrest if the latter be engaged in any quarrel, fray, or disorder. **s. 45 (3).** It has been ruled that this only applies to Officers, and does not authorize a junior Warrant or Non-Commissioned Officer to place his senior under arrest, except a Military Policeman, who acts *qua* Policeman.

Arrest is either close or open ; when not specified, it means close arrest. An Officer in close arrest is not to leave his quarters, except to take such exercise, under supervision, as may be deemed necessary by the Medical Officer. When in open arrest, he may take exercise within defined limits as to time and place, or may be directed to proceed from one station to another. He is, however, forbidden to appear at any mess or public place of amusement, and must always be dressed in uniform, but without his sash, sword, belts or spurs.

**K.R., 524, 525.**

An Officer may be placed under arrest by competent authority without previous investigation, should the



nature of the offence demand it ; but, ordinarily, a Commanding Officer will not place an Officer under arrest until he has inquired into the matter, and is satisfied that it will be necessary to proceed with the case. When an Officer is placed under arrest, a report is to be made at once to the General Officer under whose command he is. **K.R., 527.** Except when an Officer has been placed under arrest in error, he should not be released without the sanction of the highest authority to whom the case has been reported. **K.R., 526.** No Officer can demand a Court-Martial or a Court of Inquiry or persist in considering himself under arrest after he has been released. Should he think himself aggrieved, he can seek redress through the proper channel, as prescribed in s. 42.

**R.P., 8, note ; K.R., 527 ; Glode, Mil. Law, p. 82.**

Officers who are Peers or Members of the House of Commons are not privileged from arrest ; but the fact of, and reason for, their arrest should be reported to the Lord Chancellor or Speaker, respectively.

**Man., IV, 9 ; Simmons, p. 31.**

The rules as to the arrest of Officers apply to Warrant and Non-Commissioned Officers, who, if charged with a serious offence, will be placed under arrest at once ; but if the offence is not serious, it will be investigated without previous arrest.

**K.R., 528.**

When private soldiers are placed in confinement, they are usually placed in the guard detention room.

**K.R., 529.**

A private soldier charged with a serious offence is to be placed in arrest at once, **K.R., 531**, and the Non-Commissioned Officer who orders him to be confined is to do so without altercation, and will avoid coming into personal contact with the man, but will obtain the assistance of one or more privates to escort him to the guard detention room. (This rule does not apply to the Military Police.) Except in cases of personal violence or on detached duties, Lance-Corporals and

Acting-Bombardiers of less than four years' service will not confine men without previous reference to the Orderly-Serjeant. **K.R., 533**

A private soldier who is drunk is to be placed in close arrest, alone if possible. He is to be visited every two hours by a Non-Commissioned Officer of the Guard and an escort. If he appears seriously ill, a Medical Officer must be sent for at once. A man suspected of being drunk is not to be put through any drill or tested to ascertain his condition. **K.R. 534.** This of course would not apply to any medical tests to diagnose his condition, made by a Medical Officer.

The Commander of a Guard or Picquet, or the Provost-Marshal, cannot refuse to receive anyone committed to his custody, but it is the duty of the person confining the accused to deliver at the time of committal, or in any case within twenty-four hours, an account in writing, signed by himself, called "the Charge" or the "Charge report," showing the offence with which the accused is charged. **s. 45 (4).** If this "Charge report" is not received within twenty-four hours, the Commander of the Guard cannot himself release the accused, but will take steps to procure it, or will report that he has not received it to the Officer to whom he renders his Guard Report; who, if the "Charge report," or evidence sufficient to justify his detention, is not forthcoming within forty-eight hours, will order his release. The Commander of the Guard must enter in his Guard Report the name and offence of any person who has been in his custody, together with the rank and name of the person by whom he is charged, and the original "Charge report" is forwarded to the accused's Commanding Officer. If the man so requests, the Commander of the Guard must tell him the rank and name of the person who gave him into custody; and give him a copy of the "Charge Report" as soon as he receives it.

**K.R., 521.**

A man once confined can only be released by competent authority, *e.g.*, if confined in a regimental guard detention room, he can only be released by the authority of the Officer Commanding the Regiment ; and if in a garrison guard detention room, by the authority of the Officer Commanding the Garrison.

**Man., IV, 11.**

An offender in arrest or confinement is not to be required to perform any duty beyond handing over any cash, stores, or accounts for which he may be responsible, or fatigue duties on board ship, and he is not to bear arms except by order of his Commanding Officer, in an emergency or on the line of march, or by order of the Governor, in a military prison, or of the Commandant, in a detention barrack, for purposes of instruction, exercise, or practice. If, however, he has been ordered to do any duty, he is not thereby absolved from liability for his offence. **K.R., 538, 1175.** The fact of putting arms into the hands of a soldier in arrest, or employing him on duty, does not amount to condonation of his offence. Condonation must be the deliberate act, in his magisterial capacity, of the person having power to dispose of the offence. It must be an intentional act of forgiveness. **O'Dowd, p. 27.**

In the case of minor offences, the investigation of the charge may be held without the man being confined. A soldier against whom a charge for a minor offence is pending, will not quit barracks until his case has been disposed of. He will attend all parades, but will not be detailed for duty. **K.R., 529.**

When troops are in billets or on the line of march, or accommodation for soldiers in arrest is not available, the Commanding Officer may commit a soldier in military custody (not under sentence) to a civil prison or lock-up for a period not exceeding seven days. This period must not be exceeded under one or more warrants. For form of order *vide* Form Q., R.P., App. III, p. 718. **s. 132 (2), (3) ; K.R., 532.**

Except on active service, whenever anyone is detained in military custody for more than eight days without a Court-Martial being ordered for his trial, a special report must be sent to the General Officer to whom application for trial would be made, and a similar report made every eight days till the Court assembles or the accused is released. **s. 45 (1); R.P., 1.** The Officer receiving this report must satisfy himself as to the necessity for the continuance of such person in military custody. **K.R., 522.**

Any constable, Officer, soldier, or other person may apprehend anyone whom he reasonably suspects to be a deserter or absentee without leave, and bring him forthwith before a Court of Summary Jurisdiction. If the Court is satisfied that such person is a deserter, it must deliver him into military custody or remand him till he can be delivered, and a "Descriptive Return," as described in the Fourth Schedule of the Act, is forwarded to the proper military authority. **s. 154. A. Amend. Act, No. 2, s. 5. K.R., 595.** If a man surrenders to a constable in the United Kingdom as a deserter or absentee the chief officer of police at the station may deliver him into military custody without bringing him before a Court of Summary Jurisdiction, and shall send a certificate of the facts of the surrender to the proper military authority. **A. Ann. Act, 1917, s. 4.** If the man appears to be a deserter or absentee, the Commanding Officer will send an escort for him (including, if possible, men able to identify him). **K.R., 596.** If the escort fail to identify the man, they will not take him over, but will report the circumstances. **K.R., 601.**

If a deserter surrenders to a portion of his own corps, and can be identified, he will be taken into military custody. If he surrenders to any other corps or a Provost Marshal, the Officer concerned will apply to the man's unit for an escort and detain him in military custody; or, if he is an absentee, send him to his unit without an escort. In either case, the Officer

will investigate the case and send to the unit a certificate signed by himself of the fact, date, and place of surrender, which will be evidence of the matters therein stated. In no other case, however, may a person not serving be taken into military custody, except for the purpose of being forthwith handed over to the Civil Power. **K.R., 579.**

#### INVESTIGATION OF CHARGES.

All charges against Non-Commissioned Officers and men will be investigated without delay in the presence of the soldier by the Officer Commanding his Squadron or Company. Commanding Officers are authorized to grant large discretionary powers to these Officers of disposing of any offences with which they can deal themselves (*vide infra*, p. 88). Any not so disposed of will be investigated by the Commanding Officer. **K.R., 540.** A man charged with drunkenness is not to be brought up until he is perfectly sober. **K.R., 534.** All charges must be investigated by the Commanding Officer within forty-eight hours of their being reported to him, exclusive of Sundays, Good Friday, and Christmas Day. If for any reason this cannot be done, a report must be made to superior authority. **R.P., 2, 135 (A).**

Charges for offences of Non-Commissioned Officers and men confined in the guard detention room, or of Non-Commissioned Officers reserved by the Squadron or Company Commander for disposal by the Commanding Officer, are entered in the Guard Report by the Commander of the guard. Those of privates, not confined, are entered in the Minor Offence Report under the orders of the Commander of the Company, etc. If this Officer reserves such a charge for the Commanding Officer's disposal, he will send the "Charge Report" (A.F. B. 252), to be entered in the Guard Report. If the charge against a man, who has been confined, is disposed of by the Company Commander, an entry

will be made in the punishment column of the Guard Report—"Disposed of on A.F. B 281." **K.R., 541.**

The investigation of offences takes place, when practicable, in the morning, before the hour of Commanding Officer's parade. The accused is marched in under escort, without his cap, **K.R., 537**; the charge against him is read out, and the witnesses against him give their evidence; the Commanding Officer will then ask the accused what he has to say in his defence, and hear any witnesses he may wish to call. The evidence given before the Commanding Officer is not on oath, unless the accused demands it, which he has the right to do whenever the Commanding Officer deals with the case summarily. **s. 46 (6).** He may give evidence himself. **R.P., 3 (A).** The Officer Commanding the man's Company will produce his Company Conduct Sheet, and the Commanding Officer will determine how he will dispose of the case. **K.R., 541.** He will dismiss the charge if he thinks the evidence does not disclose an offence, or if he thinks the charge ought not to be proceeded with (*e.g.*, if for some trivial offence).

**K.R., 546.**

If he thinks it should be proceeded with, he may—

- (1) Dispose of the case summarily;
- (2) Refer it to the proper superior authority;
- (3) Adjourn the case to have the evidence reduced to writing.

**R.P., 4 (B).**

In the last case, after the summary of evidence has been taken, it will be considered by the Commanding Officer, who may then—

- (1) Remand the accused for trial by Court-Martial;
- (2) Refer the case to the proper superior authority;
- (3) If he thinks fit, and the accused has not claimed a Court-Martial (*vide infra*, p. 81), re-hear the case and dispose of it summarily.

**R.P., 5 (A).**

When disposing of a case summarily, the Commanding Officer must see that the evidence discloses the exact offence, so that the entry in the Guard Report is substantially the charge on which the accused would be arraigned if claiming a Court-Martial. When once the accused has *elected trial* on a charge, as read out from the Guard Report, it cannot be afterwards increased in gravity. **K.R., 544.**

The award of the Commanding Officer is entered by him in the Guard Report, and those of Officers Commanding Companies (with any remissions the Commanding Officer thinks fit to make) in the Minor Offence Report. Minor Offence Reports (A.F. B 281) (one for each Company, etc.), are kept in the Orderly Room, and are obtained by the Company Commander whenever he has an offence to dispose of. After filling in his disposal of each case, he returns the Form to the Orderly Room in order that any entries may be included in Part II Orders for the day, if necessary. On the last day of the week he signs it, and it is then attached to the Guard Report of that day. **K.R., 541, 542, 1679.** These documents are signed by the Commanding Officer and preserved to be laid before the General at the next Annual Inspection. **K.R., 1706.**

If the accused is remanded for further inquiry, his case must be brought under review daily till disposed of. **K.R., 541.** If at the time of investigation sufficient evidence is not forthcoming to show whether the accused is guilty or not, and there is no opportunity of completing the investigation at the time, the accused, if the offence be serious, may be released, without prejudice to his re-arrest when further evidence is forthcoming; if, however, the offence is trivial, the case should be dismissed. **K.R., 548.** A man claiming trial by Court-Martial under s. 46 (8) of the Army Act (*vide infra*, p. 81) may be released from arrest pending trial, if the Commanding Officer considers the circumstances of the case warrant this course.

**K.R., 549.**

There is nothing in the Army Act which prevents a Commanding Officer dealing summarily with any offence, **K.R., 608**, and indeed, he *must* so deal with the offence of drunkenness committed by a private soldier when not on duty or not warned for duty, unless the man has four previous cases of drunkenness in the last twelve months, **ss. 46 (3), 183 (1)**; but the King's Regulations, para. 543, lay down that a Commanding Officer is only to deal with offences against certain sections of the Act therein enumerated, and that charges for all other offences must be referred to superior authority; except in cases of emergency, when he may dispose of the case and report to the superior Officer. If a Commanding Officer wishes to dispose of such an offence summarily, he must refer it in a letter stating the circumstances, and forward the man's conduct sheets. **K.R., 543, 611.**

When a Commanding Officer has once awarded punishment for an offence he cannot afterwards increase it, though he may subsequently diminish it. The award is considered final when the accused has been marched out from the Commanding Officer's presence. **R.P., 6 (B), and note.**

If any punishment awarded by a Commanding Officer appears to the Army Council or a superior Officer, not below the rank of Colonel Commandant, to be illegal, they or he shall order the award to be cancelled and the entry in the man's records expunged; if such punishment is in excess of that authorized by law, they or he may vary the punishment so that it shall not exceed the authorized punishment, and the man's records will be amended accordingly. If any such punishment appears too severe, having regard to the circumstances of the case, they or he may remit any part of it, and such remission will be entered in the man's records; but after two years from the date of the award this remission can only be made by the Army Council. **R.P., 129 (A); A.O.  $\frac{203}{19}$ .**



- An offence committed by a patient in hospital will be disposed of by the Medical Officer Commanding the Hospital as soon as the man's health permits. If not disposed of before he leaves hospital it will be reported to the Officer Commanding the unit he joins, who will dispose of it. **K.R., 1425.**

## CHAPTER VI

### POWERS OF COMMANDING OFFICERS

THE term Commanding Officer, in those sections of the Act relating to *Courts-Martial*, *Execution of Sentence*, and *Power of Commanding Officer*, and in the Rules of Procedure, means the Officer whose duty it is to deal with a charge against a person subject to military law of having committed an offence. For the purpose of awards of fines for drunkenness, and of a summary finding involving forfeiture of pay, it includes the Officer Commanding a squadron or company.

**R.P., 129 ; K.R., 514.**

A Commanding Officer, in dealing with a case summarily, has the following powers :—

#### (A) IN THE CASE OF A PRIVATE SOLDIER.

He may award either a *summary* or a *minor* punishment ; **s. 46 (2), (9)**. But before awarding a summary punishment, or if the award or finding will involve forfeiture of pay, he must first ask the man whether he wishes to be tried by District Court-Martial instead of submitting to his award. **s. 46 (8)**. The soldier has no right to claim trial instead of submitting to a minor punishment. **K.R., 554**. It has been ruled that forfeiture of proficiency pay by Royal Warrant consequential to an award of a minor punishment is not included in the expression “forfeiture of pay,” which only means ordinary pay. If the Commanding Officer omits to ask the man this question, the latter may still exercise his right at any time that day before the usual hour for the commitment of soldiers under sentence. **R.P., 7 (A)**. If the man has claimed a Court-Martial, he is to be given an opportunity on the following day of reconsidering his decision, unless there are reasons against this course. **K.R., 556.**

The *summary* punishments which a Commanding Officer can inflict are :—

(i.) *Detention*, up to twenty-eight days. **s. 46 (2) ; A. & F. (Ann.) Act, 1921, s. 7.** Except in cases of absence, detention exceeding seven days will not be awarded by any but Field Officers. **K.R., 554 (i).** Detention up to seven days, inclusive, will be awarded in *hours*, and will begin to count from the time (usually 2 p.m.) the man is received at the detention barrack ; or, if he does not go sooner to the detention barrack, it begins to count on the day after the day of award, at the usual hour for the commitment of soldiers under sentence. Detention exceeding seven days will be awarded in *days*, and begins to count from the day of award. **R.P., 6 (A) ; K.R., 555 (ii), 652.**

### *Illustrations.*

The following sentences awarded on the 1st of any month will commence and expire as under :—

<i>Punishment.</i>	<i>Date of going to Detention Barrack.</i>	<i>Commences.</i>	<i>Expires.</i>
168 Hrs. detention.	2 p.m., 1st.	2 p.m., 1st.	2 p.m., 8th.
168 Hrs. detention.	2 p.m., 2nd.	2 p.m., 2nd.	2 p.m., 9th.
168 Hrs. detention.	2 p.m., 3rd.	2 p.m., 2nd.	2 p.m., 9th.
8 Days detention.	2 p.m., 1st.	1st.	Midnight, 8th.
8 Days detention.	2 p.m., 2nd.	1st.	Midnight, 8th.

A man undergoing detention may, for a fresh offence, be awarded a further sentence of detention, which begins to count from the day of award, provided that he cannot be kept in detention for more than twenty-eight consecutive days. **K.R., 555 (iv).**

(ii.) *Fines* for drunkenness, not exceeding £2, according to scale.

**s. 46 (2) ; A. & A.F. (Ann.) Act, 1921, s. 6 (2).**

The scale of fines is as follows :—

For the first offence, no fine.

For the second offence, 10s.

For the third and every subsequent offence :—

If within three months of the last offence, 40s.

If over three, but within six months, 30s.

If over six months, 20s.

The period during which a soldier is absent from duty by reason of penal servitude, imprisonment, detention, or absence without leave is not counted in the time since the last case of drunkenness.

When men are re-transferred to the colours from the reserve, cases of drunkenness recorded against them before transfer to the reserve will not be taken into account in computing the fines for further instances of that offence after they rejoin the colours.

In colonial corps the fines to be levied will be one-half the foregoing amounts. **K.R., 573.**

When a soldier's unpaid fines amount to 40s. or upwards, he should not be fined again, but detention or some other punishment should be awarded.

**K.R., 558, 573.**

### *Illustrations.*

Private A. was drunk on the 13th February, absent from the 10th March to 9th April, and is drunk again on the 4th June (3rd offence). He is liable to a fine of 4s.

Private B. was drunk on the 25th November, 1822 (2nd offence), and is drunk again on the 11th April, 1823. He is liable to a fine of 30s.

In dealing with cases of drunkenness unconnected with another offence, confinement to barracks should only be added to the fine when the circumstances are such as to add to its gravity. Detention should never be awarded for drunkenness unless the man is liable to trial, or his unpaid fines amount to 40s.

**K.R., 558.**

When a man (not on active service) commits the offence of drunkenness when not on duty, nor warned for duty, for which he is not liable to trial, together with a more serious offence, for which he is to be tried, in order to preserve a record of the drunkenness an entry will be made by the Commanding Officer, imposing a fine if the man is liable to a fine, or if he be not, by making a note in the punishment column, "No punishment, awaiting trial on another charge." If an entry of the Court-Martial is afterwards made, these two entries are bracketed together and count as one.

**K.R., 572.**

(iii.) *Any deductions from ordinary pay* authorized by s. 138 (4), (6) of the Army Act. This may be the amount required to make good any loss, damage, or destruction caused by his offence; except that in the case of a soldier who loses or damages by neglect or culpable mismanagement any article of his personal equipment or other Government property, the approval of the General Officer Commanding must be obtained if the amount to be recovered exceeds £4. **ss, 46 (2), 138 (4); K.R., 554 (iii).** In recovering stoppages from a man's pay, he must always be left a residue of one penny a day. **s. 138, proviso (a).**

On active service a Commanding Officer may also award :—

(i.) *Field punishment* for any period not exceeding twenty-eight days. **s. 46 (2).**

(ii.) *Forfeiture of ordinary pay* for any period, commencing on the day of the sentence, not exceeding twenty-eight days. This punishment may be given in addition to or without any other punishment.

**s. 46 (2).**

This forfeiture, which is a *punishment*, must be distinguished from the forfeiture *consequential* on absence entailed by R.W., 856. It may be given *in addition* to the latter.

### *Illustration.*

Private A., on active service, is absent from Tattoo on the 1st March till 4 p.m. 3rd March, and is brought before his Commanding Officer at Orderly Room on the following morning. He forfeits 2 days' pay (for the 1st—3rd March) by Royal Warrant, and the Commanding Officer can as a *punishment* order a forfeiture of any number of days not exceeding 28, which will commence from the 4th March, and will be additional to the other two.

The *minor* punishments which a Commanding Officer can inflict are :—

(i.) *Confinement to barracks* for any period not exceeding fourteen days. Confinement to barracks commences from the day of award (unless it is combined with a sentence of detention or awarded to a man

already a defaulter), and the first day of the punishment ends at midnight that day. During the time a man is a defaulter he cannot quit barracks except on duty; he will attend all parades and take all his ordinary duties, and, in addition, extra fatigues as much as possible, to relieve the well-conducted men. If these extra fatigues do not keep him fully employed, he may be given punishment drill during the first ten days of his confinement to barracks. **K.R., 554 (iv.)**. Punishment drill consists of marching in quick time in marching order, for not more than two hours a day in mounted corps, or four hours in dismounted corps. It is not to be carried on after Retreat, unless under exceptional circumstances, with the sanction of the Brigade Commander. When troops are in billets, the defaulters are to be marched out along a road for the prescribed period. **K.R., 559**. Defaulters are to answer their names at uncertain hours during the day. They are only allowed to enter the canteen during one hour in the evening. **R.G.R.I., 23**. They are not required to make up any portion of their punishment which they have missed by being in hospital, or in prison or on duty. **K.R., 555 (v.)**

(ii.) *Extra guards and picquets*; only awarded for irregularities when on, or parading for, these duties.

**K.R., 554 (v.)**

Any of the above punishments can be combined, subject to the following restrictions:—

- (1) When detention exceeding seven days is given, no minor punishment can be added.

**s. 46 (9).**

- (2) The confinement to barracks will take effect on the termination of the detention.
- (3) A man undergoing detention or confinement to barracks may be awarded a further sentence of either or both, provided the total period of detention does not exceed 28 days, and the aggregate punishment of detention and

confinement to barracks must not exceed 42 days.

- (4) A further award of confinement to barracks begins to count from the termination of the previous award. **K.R., 555.**

- (5) A fine cannot be added to an award of field punishment. **s. 46 (2), (b).**

### *Illustrations.*

Private A. is awarded 10 days' detention. No C.B. can be added.

Private B. is awarded 168 hours' detention. Any number of days' C.B., not exceeding 14, may be added.

Private C. is on the 1st November awarded 168 hours' detention and 7 days' C.B.; assuming he goes to cells on the afternoon of the 1st, his detention will expire at 2 p.m. on the 8th; the C.B. will then commence; the first day's C.B. will expire at midnight on the 8th, and the punishment will expire at midnight on the 14th.

When a Commanding Officer deals summarily at the same time with more than one offence, all the punishments awarded in respect of all these offences must be awarded conjointly within the above rules.

A private soldier may be admonished, but is not to be reprimanded. Admonition is entered in a man's conduct sheet only in cases of drunkenness and those involving forfeiture of pay. **K.R., 554, 1707.**

In the case of absence, a Commanding Officer will make no award of forfeiture of pay, as the pay is forfeited by Royal Warrant for every day of absence, but he will inform the man of the number of days' pay forfeited, which will be noted in the column of remarks. The man has the right to claim a Court-Martial if he denies the absence. This rule as to forfeiture applies also to all Warrant and Non-Commissioned Officers.

**s. 46 (8) ; K.R., 556 ; R.W., 856 (a).**

Deprivation of a privilege, *e.g.*, forfeiture of a permanent pass, is not a minor punishment, even though incurred in consequence of an offence.

**(B) IN THE CASE OF NON-COMMISSIONED OFFICERS.**

In dealing with Non-Commissioned Officers, including acting Non-Commissioned Officers, the Commanding Officer cannot award any summary or any minor punishment except as follows ; they may be—

- (i). Admonished ;
- (ii.) Reprimanded ;
- (iii.) Severely reprimanded ;
- (iv.) Awarded any deduction from ordinary pay authorized by s. 138 (4) of the Army Act (subject to the right to elect trial by Court-Martial).
- (v.) Ordered to revert to their permanent grade, or any intermediate acting or lance rank, if an acting or lance Non-Commissioned Officer ;
- (vi.) Removed from any appointment. (If the soldier's permanent rank is above that of Corporal, the sanction of an Officer not below the rank of Colonel Commandant will be necessary.) **K.R., 262, 554, 560.**

A soldier whose permanent rank is private (or equivalent rank) holding acting rank or an appointment above that of acting bombardier or lance-corporal, may be reverted to a lower grade of acting rank or to the ranks. A Non-Commissioned Officer holding acting rank in a higher grade may be reverted to acting rank of a lower grade, or to his permanent rank. These awards may be for an offence or otherwise.

**K.R., 262.**

An Acting Warrant Officer (Class I or II) whose permanent rank is below that of Non-Commissioned Officer may be similarly dealt with by his Commanding Officer.

The temporary rank of Warrant and Non-Commissioned Officers promoted under A.C.I. 386 of 1919 is for disciplinary purposes to be treated as the equivalent of substantive rank ; hence it cannot be forfeited by the Commanding Officer's award. **A.C.I. <sup>386</sup><sub>1919</sub>.**



If any Non-Commissioned Officer on removal from his appointment is not qualified for the duties of his permanent rank, the Commanding Officer will refer the case to Headquarters, with a view to his reduction by the Army Council. **s. 183 (2), (c) ; K.R., 263.**

When a Non-Commissioned Officer is convicted by the Civil Power, the case is to be reported to an Officer not below the rank of Colonel Commandant to decide whether he will recommend his reduction under s. 183 (2). **K.R., 568.** In India a similar report is to be made to the Brigade Commander, who will decide whether to recommend his reduction to the District Commander. **A.R.I., Vol. II, 9, 217.**

A Non-Commissioned Officer is only permitted to resign his rank in order to escape trial with the sanction of an Officer not below the rank of Colonel Commandant ; an entry of the fact is made in the man's attestation paper, and signed by him and the Commanding Officer. **K.R., 261, 1694 (ii).**

#### POWERS OF OFFICERS COMMANDING COMPANIES AND DETACHMENTS.

Officers Commanding Companies, etc., may award private soldiers punishment not exceeding seven days' confinement to barracks, extra guards and picquets, and the regulated fines for drunkenness ; and may deal with cases of absence where pay is automatically forfeited by Royal Warrant. They can also admonish or reprimand, but not severely reprimand, Non-Commissioned Officers below the rank of Serjeant or appointment of Lance-Serjeant. In the case of Officers of less than three years' service, the Commanding Officer may limit their powers to three days' confinement to barracks. Such awards are subject to any remission the Commanding Officer may order, but cannot be increased. **K.R., 560, 562.**

The Officer Commanding a Detachment, if of field rank, has the same powers as the Officer Commanding

a Corps ; but if he is under this rank he may be restricted in these powers, either by the Officer Commanding the Corps if in the same command, or the Officer Commanding the Garrison or other superior authority. If, however, necessity arise, he may, notwithstanding such restriction, act to the full powers of a Commanding Officer, sending an immediate report of his action to the Officer who had restricted his powers.

**K.R., 515.**

## CHAPTER VII

### POWER TO DEAL SUMMARILY WITH OFFICERS AND WARRANT OFFICERS

When a Commanding Officer investigates a charge against an Officer or Warrant Officer, he has power to dismiss the charge if he thinks it should not be proceeded with; if he thinks it should be proceeded with, he cannot deal summarily with the case, but will remand the accused for trial by Court-Martial, or if the latter is an Officer below the rank of Field Officer or is a Warrant Officer, he may refer the case to be dealt with summarily by a General Officer or Colonel Commandant authorized to dispose of such cases.

**s. 46 (1) ; A. (Ann.) Act, 1919, s. 5 ; A. & A.F. (Ann.) Act, 1920, s. 4 ; A. & A.F. (Ann.) Act, 1923, s. 13 (1).**

If the Officer is not already in arrest, the Commanding Officer will now place him in arrest. **K.R., 527.**

The Authorities who have power to deal summarily with such a case are, any General Officer or Colonel Commandant authorized to convene a General Court-Martial, or any Officer (not below the rank of Major-General) appointed by the Army Council, and on active service, the General Officer Commanding-in-Chief in the Field, and any Officer not below the rank of Major-General, appointed by him.

**s. 47 (1) ; A. (Ann.) Act, 1919, s. 6 ; A. & A.F. (Ann.) Act, 1920, s. 4 ; A. & A.F. (Ann.) Act, 1921, s. 8 (1).**

A General Officer or Colonel Commandant should only exercise this power in respect of offences against the sections of the Army Act mentioned in K.R.

**K.R., 545.**

The Authority dealing with the case, may dismiss it, with or without hearing the evidence, or, if he thinks it should be proceeded with, may either take steps for bringing the offender to trial by Court-Martial or deal summarily with it by awarding one or more of the following punishments :—

(a) In the case of an Officer—

(1) Forfeiture of seniority of rank either in the Army or in the offender's corps, or both, or where an Officer's promotion depends on length of service, forfeiture of all or any part of this service towards promotion.

(2) Severe reprimand.

(3) Reprimand.

(b) In the case of a Warrant Officer—

(1) Forfeiture of seniority of rank.

(2) Severe reprimand.

(3) Reprimand.

(4) Any deduction from ordinary pay authorized by the Act.

**s. 47 (2) ; A. (Ann.) Act, 1919, s. 6 ; A. & A.F. (Ann.) Act, 1922, s. 5 ; A. & F. (Ann.) Act, 1923, s. 13 (2).**

The forfeiture of seniority or service should not exceed twelve months. **K.R., 552, 553.**

Unless he awards a severe reprimand or a reprimand, the Authority must ask the accused whether he wishes to be dealt with summarily or elects trial by Court-Martial. The accused can always claim to have the evidence against him taken on oath.

**s. 47 (3), (4) ; A. (Ann.) Act, 1919, s. 6.**

A General Officer dealing with a charge against an Officer is not concerned with the financial aspect of the case, and the fact that he has awarded punishment is no bar to the Army Council exercising their powers to order stoppages to make good any loss of, or damage to, public property, or any public claim.

**s. 137 (4) ; R.W., 9, 23.**

## CHAPTER VIII

### PROCEEDINGS BEFORE TRIAL

BEFORE considering the various steps to be taken when a soldier has been remanded for trial by Court-Martial, it will be convenient to note here the case of a man having confessed either desertion or fraudulent enlistment, and his trial for the offence being dispensed with by a competent military authority. When a man has signed a confession of having committed either of these offences, and it is not considered desirable to try him, application is made to one of the authorities named in s. 73 of the Army Act (usually the Brigade Commander, if not below the rank of Colonel Commandant) for authority to dispense with his trial. The confession should accompany the application, and, if possible, evidence as to its truth. The form of confession to be used is given in K.R., para. 603. It must be noted that the certificate of surrender (A.F. O 1617) is not in itself sufficient as a confession, as it is not signed by the soldier, as required by s. 73. If the Brigade Commander, or other competent authority, decides that the man shall not be tried, he issues an order dispensing with his trial (for form of order *vide* A.F. A 46). This will be equivalent to a trial by Court-Martial, and will be entered in the man's regimental and company conduct sheets. He will forfeit all service towards limited engagement or re-engagement prior to the date of signing the order. And he will suffer the same forfeitures and deductions from pay as if he had been convicted by Court-Martial, except such as are specially mentioned in the order.

**ss. 73, 79 (2), 84 (2) ; R.P. 126 (F) ; K.R., 602-606, 1702 (ii), 1767.**

#### SUMMARY OF EVIDENCE.

When a soldier has been remanded for trial by Court-Martial, the first thing to be done is to take the

summary of evidence. This is a statement taken down in writing, in a narrative form, of the evidence given by the witnesses at the investigation held before the Commanding Officer, and of any other witness whose evidence is relevant. It is taken in the presence of the accused and of the Commanding Officer, or some Officer deputed by him. An Officer who is a material witness must not be detailed for this duty. The accused may question the witnesses, and these questions and answers will be included if material. After all the evidence against him has been recorded, the accused will be asked whether he wishes to make any statement or give evidence on oath, and must be cautioned that he need not do either unless he wishes, but that anything he says will be taken down in writing and may be given in evidence. The accused can give evidence himself and call witnesses in his defence, and make any statement he likes, which will be added in writing, but he cannot be required to sign it, and he cannot be cross-examined. No evidence will be admitted of any statement he may have made or of any evidence he may have given at the taking of the summary of evidence before the above caution was given to him. The witnesses sign their statements, and the whole summary is signed by the Officer before whom it is taken, who will add a certificate that the requirements of R.P. 4 have been complied with. The accused's evidence and any statement he makes must be kept quite distinct.

**R.P., 4 (C), (D), (E), and notes 7, 8 ; A.O.  $\frac{439}{20}$ ;  
Man., p. 703.**

If the Commanding Officer directs, or if the accused demands it, the evidence shall be taken on oath, and the oath will be administered by the Officer taking the summary in the same manner as is provided for a witness at a Court-Martial (*vide infra*, p. 136).

**s. 70 (6) ; A. & A.F. (Ann.) Act, 1920, s. 16 ;  
R.P. 4 (F) ; A.O.  $\frac{439}{20}$ .**

Civilian witnesses can be summoned and are bound to attend and give evidence at the taking of the summary, if required, in the same way as they are bound to attend a Court-Martial, as described *infra*.

**s. 125 ; A. & F. (Ann.) Act, 1920, s. 20 ;**

**R.P. 4 (H) ; A.O.  $\frac{4.9.9}{20}$ .**

If, in the opinion of the Officer taking the summary (such opinion to be certified in writing), the attendance of any witness cannot be readily procured, a written statement of the evidence he will give, signed by him, may be read to the accused and included in the summary ; provided that the accused may demand his attendance, if such attendance is reasonably possible.

**R.P. 4 (G) ; A.O.  $\frac{4.9.9}{20}$ .**

In the case of an Officer a summary of evidence need not be taken unless he demands it ; but he must then be furnished with an *abstract* of the evidence at least twenty-four hours before his trial. This rule applies when an Officer is to be summarily dealt with by a General Officer.

**R.P., 8 ; A.O.  $\frac{2.0.8}{19}$ .**

The uses of this summary of evidence are : first, it is considered by the Commanding Officer, who decides how he will deal with the case ; **R.P., 5 (A)** ; next, it is forwarded with the application for trial to the Convening Officer, to enable him to see that there is a *prima facie* case against the accused. If he decides to try him, the summary is forwarded to the President, to let him get a general idea of the case he is going to try ; it is laid before the Court by him, and can be used in checking the evidence given by the witnesses at the trial. **R.P., 17 (A), (E), and note 5.** The Court of Criminal Appeal has recently decided that if a witness at the trial denies on oath the statement made by him in the summary, the Court cannot take any notice of such previous statement, but are bound by the evidence given by the witness at the trial, though they may consider such contradiction as a ground for discrediting the credibility of the witness. If the accused pleads

guilty, it is read to the Court to let them see the circumstances under which the offence was committed, and thus guide them in determining the sentence, and it is then attached to the Proceedings to guide the Confirming Officer. **R.P., 37 (B), App. II, p. 683.**

### FRAMING CHARGES.

The next step will be to draw up a charge sheet containing the charges which the evidence given in the summary discloses, and upon which it is intended to try the accused.

A charge is an accusation that a person subject to military law has been guilty of an offence. A charge sheet contains the whole issue or issues to be tried at one time, and may contain one or more charges.

**R.P., 9.**

Every charge sheet must begin with the name and description of the accused and an averment that he is subject to military law. If the accused is a member of the Militia or the Territorial Army, or a civilian, it must be stated how it is that he is subject to military law. **R.P., 10** and *note 2*. Reservists, when called out on permanent service, become soldiers of the Regular Forces and should be so described. **s. 190 (8)**. The full Christian names should be set out and should *precede* the surname, and in the case of a soldier his army number should always *precede* his rank and name. **K.R., 1684**. The proper forms to be used for the commencement of a charge sheet are given in **R.P., App. I, Part I, p. 649 *et seq.***

Where an accused has been described in the charge sheet by a wrong rank, and has been tried and sentenced as though that were his true rank, and the error has been subsequently discovered, it has been held that the sentence, if inappropriate to his true rank, must be expunged, but that the conviction may stand if he has not been prejudiced by such misdescription.



Each charge is divided into two parts :—

- (1) The statement of the *offence*.
- (2) The statement of the *particulars*.

The statement of the *offence* must, unless it is a civil offence, be in the words of the Army Act, and, if a civil offence, in such words, not necessarily technical, as will sufficiently describe the offence. When the charge is framed under s. 41 for committing a civil offence, the essence of the offence must be expressed in the charge ; *e.g.*, if charged with damaging property it must be stated the damage was done *maliciously*. **R.P., 11 (B), (c), and note 5.** The statement of the offence will be in the forms given in R.P., App. I, Part II, pp. 650-659. In using these forms, the following rules must be observed.

Where two or more words or expressions are bracketed together, the particular word or expression which most accurately describes the offence must be used.

**R.P., App. I (5).**

### *Illustration.*

- |   |   |  |
|---|---|--|
| s. 8 (1). Striking<br>Using violence to<br>Offering violence to | } | his superior Officer, being in<br>the execution of his office. |
|---|---|--|

Here, the expression used must be "striking," "using violence to," or "offering violence to," according as the accused actually *struck* or *used other violence* (*e.g.*, kicked), or *offered violence* (*e.g.*, attempted to strike).

- |                   |   |  |
|-------------------|---|--|
| Losing by neglect | { | his arms.<br>his ammunition.<br>his equipments.<br>his instruments.<br>his clothing.<br>• his regimental necessities.<br>a horse of which he had charge. |
|-------------------|---|--|

Here, the words used will be those which describe the articles lost, *i.e.*, "arms," if they are a rifle or sword ; "equipments," for belts, water-bottle, etc. ; "clothing," for tunic, cape, boots, etc. ; "regimental necessities" for shirt, socks, brushes, etc.

The word "and" may be used to couple two or more such words or expressions ; but a charge must never be in the alternative ; thus, the word "or" joining two such expressions would be a bad charge.

**R.P., App. I (7),**

*Illustrations.*

" Losing by neglect his clothing *and* regimental necessaries " is a good charge.

" Losing by neglect his clothing *or* regimental necessaries " is a bad one, as it leaves it doubtful whether the accused is charged with losing his clothing *or* his necessaries.

Where, in the forms, words in italics, enclosed in square brackets, are shown, it will be necessary to substitute for these general words the exact words defining the circumstances of the offence.

**R.P., App. I (11).**

*Illustration.*

s. 11. Neglecting to obey { General  
Garrison } Orders.  
[other]

If, for instance, the accused has disobeyed Regimental Orders, then the word " Regimental " must be substituted for [other] in the statement of the offence.

Words shown in square brackets [ ] will be adopted or not, according to circumstances.

**R.P., App. | 12).**

*Illustration.*

s. 12. [When on active service] deserting His Majesty's service.

The words in brackets must be omitted if the accused was not " on active service."

These words "when on active service" should properly be inserted in all charges for offences committed on active service to enable the Court to award a sentence of field punishment or forfeiture of pay.

The statement of the *particulars* need not be in any prescribed form of words, but they must state such circumstances concerning the offence as will enable the accused to know what the particular crime he is charged with consists of. **R.P., 11 (D).** All the ingredients necessary to constitute the offence should be stated. If the exact place is the essence of the offence, it must be stated, otherwise a general description will suffice, and sometimes such words as "near" or "between" may be used. Similarly, a date should be stated, and if the exact date is not known, the words

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“on or about” may be used; but if the exact date and time are of the essence of the offence, they must be stated. Sometimes the particulars in one charge may refer to the particulars in another, *e.g.*, “at the place and on the date mentioned in the first charge.”

**R.P., 11 (E) ; App. I (16)-(22).**

When the offence has caused any loss, for which it is desired the Court should award stoppages, the particulars of this loss must be added, as, for example, when a man is charged with fraudulent enlistment, an averment is added, stating that he “thereby obtained a free kit of necessaries, value —.” A similar averment is added when a man is tried for improperly enlisting from the Army Reserve, provided the trial takes place within three months of the offence.

**R.P., 11 (F), App. I (23) ; K.R., 620, 623.**

It has been ruled that the expression “free kit” only includes the articles of necessaries mentioned in Clothing Regulations, p. 118, Table xiii.

**G.R., Pt. I, 132.**

In the case of making away with or losing kit, values are put in the charge sheet only against articles which are Government property; those which are the soldier's own property he will have to replace at his own expense, without any sentence of the Court. These values must be those of the articles at the time of loss, etc.

**K.R., 623.**

In framing charges under s. 24, in the absence of evidence of some positive act of pawning or selling, etc., a charge of “making away with” should not be framed, but the accused should be charged with “losing by neglect.”

**K.R., 622.**

The statement of the *particulars* must correspond in substance with the statement of the *offence*; if there is such a divergence between them that in effect the latter specifies one offence and the former another, the charge is bad in law and cannot stand. **O'Dowd, p. 22.**

It must be observed, as already noted against the different sections when considering the different crimes, that some of them can only be committed by an Officer, and others by a soldier.

### *Illustrations.*

- s. 10 (4).—Breaking out of barracks,  
Could *not* be charged against an Officer.
- s. 16.—Behaving in a scandalous manner unbecoming an Officer and a gentleman,  
Could only be charged against an Officer.
- s. 18 (4).—Stealing goods, the property of a comrade.  
Could *not* be charged against an Officer.
- s. 37.—Striking a soldier,  
Could only be charged against an Officer or N.C.O., *not* a Private.

Each charge must disclose one offence only, and in no case can an offence be described in the alternative in the same charge. **R.P., 11 (A).** Thus, it would be wrong to charge a man with “making away with by pawning *and* selling his arms, etc.” If the evidence shows that he pawned some articles and sold others, two charges must be framed, one charging him with *pawning* certain things, the second with *selling* the other articles.

**R.P., App. I (7)-(10).**

A single transaction, though technically including more than one offence, should as a rule not be made the subject of more than one charge. On the other hand theft of goods belonging to different owners must not be included in one charge.

**R.P., 11 (A), note 2.**

When it is doubtful whether the facts proved by the evidence are more correctly described by one word or expression than another, alternative charges may be framed, each charge containing one of the expressions which appear applicable to the facts capable of being proved, *e.g.*, “Stealing goods the property of a comrade,” or “Receiving, knowing them to be stolen, goods, the property of a comrade.”

**R.P., App. I (6).**

A charge of *absence without leave* should not be added as an alternative to a charge of *desertion*; or a charge of releasing or permitting the escape of a prisoner

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*without reasonable excuse* as an alternative to one of *wilfully* releasing or permitting his escape ; or a charge of disobeying a lawful command *framed under s. 9 (2)* as an alternative to one *framed under s. 9 (1)* ; as in all these cases, if the Court do not think all the ingredients necessary to support the graver charge proved, they have power under s. 56 to find the accused guilty of the less serious offence.

Separate charge sheets are used to prevent the embarrassment to the Court or the accused which might arise by trying several charges at one time, especially if the facts are very complicated, or if the offences took place at different times, or if quite different sets of witnesses are required to prove the various charges. In practice, therefore, not more than three or four charges should be placed in the same charge sheet, and offences of different descriptions should be in separate charge sheets, unless they form part of the same wrongful transaction.

**R.P., 62 (A), note.**

When a soldier is arraigned on a serious charge, minor charges against him are not usually included in the charge sheet.

**K.R., 568.**

The charge sheet must be signed by the accused's Commanding Officer, but the fact that it is not so signed will not invalidate the proceedings of the Court if the charges have been actually approved by the Commanding Officer before trial. The section of the Act under which each charge is framed should be inserted in the margin in red ink. If the accused has elected to be tried, it should be so stated at the top of the charge-sheet.

**R.P., 9 (note), 56 (B) ; A.O.  $\frac{158}{19}$  ; Man., p. 703.**

### *Illustrations.*

1. Evidence tends to prove that Private A. sold to a civilian two shirts which he had been seen to take stealthily out of Private B.'s valise.
2. Private C., who has not been drunk for over a year, gets drunk, uses insubordinate language to Serjeant D., and knocks him down.
3. Private E., a Militiaman, out for training, is awarded 7 days' C.B. by his Commanding Officer ; he is found by the plequet in the town that evening.

The following would be the proper charge sheets to frame against these men :

1. CHARGE SHEET.

- The accused, No. 1418, Private John A——, 1st Bn. Royal Scots, a soldier of the Regular Forces, is charged with—
- s. 18 (4). Stealing goods, the property of a comrade,  
in that he  
at Edinburgh, on the 29th October, 1922, stole two flannel shirts,  
value 7s. 10d., the property of James B——, a private of the same  
regiment.
- Edinburgh D. GORDON, Lt.-Col.,  
31st Oct., 1922. Commg. 1st Bn. R. Scots.

2. CHARGE SHEET.

- The accused, No. 5396, Private William C——, 2nd Bn. East Kent Regiment, a soldier of the Regular Forces, is charged with—
- s. 8 (2). Striking his superior Officer,  
in that he  
at Aldershot, on the 30th October, 1922, struck with his clenched fist  
Serjeant Peter D——, of the same regiment.
- Aldershot, H. SMART, Lt.-Col.,  
1st Nov., 1922. Commg. 2nd Bn. Buffs

3. CHARGE SHEET.

- The accused, No. 2278, Private Patrick E——, a Militiaman,  
of the 3rd Bn. Essex Regiment, out for training, is charged with—
- s. 10 (4). Breaking out of camp,  
in that he  
at Colchester, on the 1st June, 1922, broke out of camp when  
confined thereto by order of his Commanding Officer.
- Colchester, M. FITZGERALD, Lt.-Col.,  
3rd June, 1922. Commg. 3rd Bn. Essex Regiment.

### APPLICATION FOR TRIAL.

An application for the assembly of the Court must be made on A.F. B 116, and the documents specified in the Form must be sent in with it. These documents are :—

1. The charge sheet in duplicate.
2. The summary of evidence.
3. The accused's Regimental and Squadron or Company Conduct Sheets.
4. List of witnesses for the prosecution and defence, with their present stations.
5. Statement as to the character and service of the accused on A.F. B 296.

This last-named document contains the following information :—

- (1) A summary of the entries (if any), exclusive of convictions by Court-Martial or a Civil Court or of trial being dispensed with, in the accused's Company Conduct Sheet, distinguishing between those within the last twelve months and since enlistment ; and instances of gallant conduct (if any). If the charge is for drunkenness, the entries for drunkenness must be recorded separately with dates.
- (2) Whether the accused has been previously convicted. If so, the previous convictions or dispensation with trial are set out in a schedule attached to the Statement. **K.R., 606.** It has been ruled that convictions when serving on a previous attestation should not be included, unless the soldier is being tried for an offence connected with enlistment. **K.R., 613.**
- (3) Whether he is under sentence already, and, if so, for how long.
- (4) How long he has been awaiting trial.
- (5) His age, date of attestation, service towards discharge or transfer to Reserve ; service towards pension ; (if a Warrant Officer or Non-Commissioned Officer, how long he has served in the different ranks).

The names of the Officers who investigated the case, including the Company Commander who made the preliminary inquiry and the Officer who took down the summary of evidence, are stated, in order that they may not be detailed as members of the Court. If there has been a Court of Inquiry respecting any matter connected with the charge, the date and place will be stated, with the names of the members of the Court.

The certificate at the foot of the application, to the effect that the accused is in a good state of health or otherwise, must be signed by the Medical Officer.

**Man., p. 727 ; R.P., 19 (B), App. II, pp. 693, 694 ; A.F. B. 116.**

If the accused elected to be tried instead of submitting to a summary award of his Commanding Officer, it should be so stated on the application.

**Man., p. 703.**

The time which elapses between the Commanding Officer's remanding the accused for trial and forwarding the application for a Court-Martial should not, under ordinary circumstances, exceed thirty-six hours.

**R.P., 5 (B).**

#### DUTIES OF CONVENING OFFICER.

On receiving an application for a Court-Martial, the Convening Officer should satisfy himself that the charge sheet discloses an offence against the Army Act and the evidence in the summary justifies a trial. He should also be careful that the proposed Court has jurisdiction to try the accused. **R.P., 17 (A), (B).** He may convene either a General Court-Martial or District Court-Martial if he has a warrant enabling him to do so, or he may refer the case to superior authority, or he may send back the application telling the Commanding Officer to dispose of it summarily (unless the accused has elected trial), or in the case of an Officer or Warrant Officer, dispose of the charge summarily if he has power to do so. **K.R., 609.** In the United Kingdom, if he proposes to convene a General Court-Martial, he must submit the charge sheet and summary of evidence to the Judge Advocate-General, with a request that a Judge Advocate may be appointed to the Court. **R.P., 17 (note 2), 101 (A) (note).** If the Officer who would ordinarily convene a General or District Court-Martial is the accused's Commanding Officer or has investigated the case, he cannot, except on board ship, dispose of it, but must refer it to superior authority. This does not apply to a charge against an Officer which has been investigated by a General Officer, but not disposed of summarily by him. **K.R., 610.**



If he decides to convene a Court, he must issue the necessary order (for Form *vide* R.P., App. II, p. 677); he must appoint the President by name, and detail the necessary number of officers and any waiting members he may think expedient, either by name or by ranks and units, **s. 48 (9)** and *notes*; **R.P., 17 (D), K.R., 637, 638**. The Officers must be detailed in turn according to the roster of duties. **K.R., 1273, 1274 (iii)**. This order prevents any suspicion of "packing" a Court. **Simmons, p. 10.**

He must be careful to state in the convening order "his opinion," where such is required, as to :—

- (i.) The rank of the President. **s. 48 (9).**
- (ii.) The ranks of the members. **R.P. 21 (B).**
- (iii.) The members belonging to the same unit. **R.P. 20 (A).**
- (iv.) The members, in the case of the trial of a person belonging to the Auxiliary Forces. **R.P. 20 (B).**
- (v.) There being no Officer present authorized by Admiralty warrant to convene a General Court-Martial, in the case of a General Court-Martial for the trial of a Marine overseas. **s. 179 (1).**

He will deal with the various documents sent in with the application for trial as follows :—

One copy of the charge sheet will be filed with the application.

The other copy of the charge sheet and the summary of evidence will be sent to the President.

The soldier's conduct sheets, the list of witnesses, and the statement as to the accused's character and service, will be sent back to his Corps.

**R.P., 17 (E); Man., p. 727.**

The Convening Officer is responsible for the legality of the charge sheet, **R.P., 17 (A)**, and that a duly qualified Officer is named to act as Prosecutor; if he has no one serving under his command fit for the duty,

he must apply to superior authority for one. **K.R., 633.** He must also take the proper action to secure the attendance of all the witnesses required either for the Prosecution or Defence, whose attendance can reasonably be required. **R.P. 78 (A).**

As already noted, if more than fifteen days in the United Kingdom, or thirty days elsewhere, elapse between the receipt of an application for a Court-Martial, or to deal summarily with an Officer or Warrant Officer, and the disposal of the case, either by the assembly of the Court or otherwise, the General Officer must report the circumstances, at home to the General Officer Commanding the Command or District, or in a colony or foreign country to the General or other Officer in command of the troops. If the Officer is himself in chief command the report will be made to the Army Council. In India the report will always be made to the Commander-in-Chief in India.

**R.P., 17 (c) ; A.O.  $\frac{75}{21}$ .**

#### DEFENCE.

An accused person is to be given every facility for preparing his defence, and is to be allowed free communication with his witnesses and any friend or legal adviser he wishes to consult. **R.P., 13.** As soon as possible after he has been remanded for trial, he is to be given gratis a copy of the summary of evidence, by an Officer, who will explain to him his rights for preparing his defence, and ask him to state in writing whether he wishes an Officer assigned by the Convening Officer to assist him at his trial, if one be available. It is not necessary to produce this certificate to the Court or to attach it to the Proceedings. **R.P. 13 (A) ; A.O.  $\frac{439}{20}$ .** He is to be warned for trial by an Officer, not less than twenty-four hours before his arraignment. The Officer warning him is to give him a copy of the charge sheet, and will read it to him, and, if necessary, explain it ;

and he is to be asked if he wishes any witnesses summoned for his defence. He is not bound to disclose his witnesses, but if he gives their names reasonable steps will be taken for securing their attendance, otherwise the onus of procuring them will rest on him. He may be required to undertake to defray the cost of their attendance. **R.P., 14, 77, 78 (A).** A list of the Officers who are to form the Court, together with any waiting members, will be given to him, if he so desires, as soon as they have been detailed; in the case of a General Court-Martial, this list would be given in any case. **R.P., 14, and notes.** If he is to be jointly tried, he must be so informed, to give him an opportunity of claiming separate trial if he has grounds for such claim. **R.P., 15.** If it is intended to employ Counsel for the prosecution, he must be so informed at least seven days before the trial, unless he has given notice that he intends to employ Counsel for his defence. **R.P., 89 (B).** If a Judge-Advocate has been appointed, he can consult him on any point of law.

**R.P., 103 (A).**

If it appears to the Convening Officer or the Senior Officer on the spot that military exigencies or the necessities of discipline make it impossible or inexpedient to comply with the rules as to the taking of the summary of evidence, or for the defence of the accused and warning him for trial, such Officer may by order "under his hand" make a declaration as to such exigencies and stating which of the rules may be dispensed with. But the accused must have every facility for preparing his defence that circumstances permit. This order must be signed by the Officer personally, and cannot be signed by a staff or other Officer on his behalf.

**R.P., 104.**

## CHAPTER IX

### COURTS-MARTIAL : THEIR DESCRIPTION, COMPOSITION, AND POWERS

THERE are two ordinary kinds of Courts-Martial, the *General* and the *District*. There is also another Court, which is only assembled on active service, or in places beyond the seas, when a General Court-Martial cannot be convened ; this is called the *Field General Court-Martial*, and will be dealt with in Chapter XIII. We will consider each of the other Courts in order.

#### (A) GENERAL COURT-MARTIAL.

*Convening Authority*.—The King or some qualified Officer having a warrant authorizing him to convene such a Court. **s. 48 (1)**. This warrant may come immediately from the King or from some Officer authorized to delegate his authority. **s. 122 (1)**. A “qualified Officer” means any Commanding Officer not below the rank of Field Officer, the Lord-Lieutenant of Ireland, the Governor-General of India, or the Governor of a Colony Commanding any part of His Majesty’s Forces, or where troops are serving beyond the seas the Officer in command, whether he belongs to the Navy, Army, or Air Force, provided he is not below a Field Officer or corresponding rank, and, in special cases abroad, an Officer not below the rank of Captain.

**s. 122 (6) ; A. & A.F. (Ann.) Act, 1923, s. 6.**

These warrants are usually issued :—

At home—to the General Officers Commanding a Command, the London or North Irish Districts, Jersey or Guernsey ;

In India—to the Commander-in-Chief ;

In the Colonies—to the General or other Officer Commanding ;

On Active Service—to the General Officer Commanding. **Man., V, 20, 21.**

For forms of Warrants *vide* Man., pp. 722-726 as amended by A.O.  $\frac{204}{19}$ ,  $\frac{97}{22}$ .

For the trial of a Marine, an Admiralty warrant is also necessary, except when the accused is serving with the Regular Forces beyond the seas, and the Convening Officer certifies in the order convening the Court, that no Officer having an Admiralty warrant is present.

**s. 179 (1).**

*Legal Minimum.*—Five. It is usual, especially if the trial is likely to be long, to detail more than the legal minimum.

**s. 48 (3) ; A. & A.F. (Ann.) Act, 1920, s. 13 ; K.R., 637.**

*Service Required.*—Each Officer must have held a commission for not less than three years. **s. 48 (3).**

*Corps of Members.*—They should as far as seems practicable belong to different corps, and they *must* not all belong to the same Regiment of Cavalry, or Battalion of Infantry, or Brigade of Artillery, unless the Convening Officer certifies in the order convening the Court that, having due regard to the public service, other Officers are not available. **R.P., 20 (A) and note.** When the accused belongs to the Auxiliary Forces, one member of the Court at least should belong to that branch of the Auxiliary Forces to which the accused belongs, unless the Convening Officer certifies in the order convening the Court that this is not practicable. Although this provision does not in strictness include the Militia the same rule should be observed for the trial of a Militiaman. A regular Officer who is the Adjutant of a Militia or Territorial Unit is not considered to be an Officer of the Militia or Territorial Army. **R.P., 20 (B) and note.**

*Rank of President.*—Not below Field Officer, unless the Convening Officer is below that rank or certifies in the order convening the Court that, having due regard to the public service, a Field Officer is not available, when he may be a Captain. **s. 48 (9).** An Officer holding brevet rank is a Field Officer. **K.R., 1282.** It has been ruled that honorary rank does not qualify for the presidency of a Court-Martial. If a General Officer or full Colonel is available as President, no Officer of inferior rank should be detailed. **K.R., 639.**

*Rank of Members.*—Four must not be below the rank of Captain. **s. 48 (3); A. & A.F. (Ann.) Act, 1920, s. 13.** When an Officer is being tried, all the members must be of equal or superior rank to the accused, unless the Convening Officer certifies in the order convening the Court that Officers of that rank are not available, and in no case may an Officer under the rank of Captain sit on a Court for the trial of a Field Officer. **s. 48 (7); R.P., 21 (B).** If a Commanding Officer is being tried, as many members as possible are to be Officers who have held, or are holding, similar commands to that held by the accused. **K.R., 639.**

*Judge Advocate.*—A fit person *must* be appointed as Judge Advocate. **R.P., 101 (A).**

*Jurisdiction.*—All persons subject to military law. **s. 48 (6).**

*Powers of Punishment.*—Death or any less punishment. **s. 48 (6).**

*Confirming Authority.*—The King, or an Officer having a warrant authorizing him to confirm, whether such warrant comes immediately from the King or from some Officer authorized to delegate his authority. **s. 54 (1b).**

The warrants now in force authorizing Officers to confirm the Proceedings of General Courts-Martial give them powers as under :—

A General Officer Commanding at Home can confirm, except sentences of death, penal servitude, imprisonment, cashiering, or dismissal on an Officer, or death or penal servitude on a soldier, which must be sent to the King for confirmation.

The Commander-in-Chief in India or of an army in the field can confirm any sentence.

The Governor of a Colony can confirm any sentence.

A General or other Officer Commanding the Forces elsewhere than in the United Kingdom or India can confirm, except sentence of death, penal servitude, cashiering, or dismissal on an Officer (other than a Native Officer), which must be referred to the King or Governor of the Colony.

An Officer having delegated authority to confirm may be directed to refer sentences of death, penal servitude, cashiering, or dismissal on an Officer to the Officer from whom he receives his authority. **Man., pp. 722-725 ; A.O.  $\frac{204}{19}, \frac{97}{22}$ .**

#### (B) DISTRICT COURT-MARTIAL.

*Convening Authority.*—An Officer authorized to convene a General Court-Martial, or an Officer not below the rank of Captain authorized to convene a District Court-Martial by a warrant from the first-mentioned Officer. **ss. 48 (2), 123 (1).**

These warrants are issued by General Officers Commanding to Divisional Commanders, Commanders of Coast Defences, and others not below the rank of Lieutenant-Colonel. **K.R., 40.**

For form of Warrant *vide* Man., p. 726, as amended by A.O.  $\frac{204}{19}, \frac{97}{22}$ .

*Legal Minimum.*—Three is the number fixed by the Act, **s. 48 (4)**; but in doubtful or difficult cases, five should, if possible, be detailed. **K.R., 637.**

*Service Required.*—Each Officer must have held a commission for not less than two years. **s. 48 (4).**

*Corps of Members.*—They should as far as seems practicable belong to different corps, and they *must* not all belong to the same Regiment of Cavalry or Battalion of Infantry, or Brigade of Artillery, unless the Convening Officer certifies in the order convening the Court that, having due regard to the public service, other Officers are not available. **R.P., 20 (A), and note.**

*Rank of President.*—Not below Field Officer, unless the Convening Officer is below that rank or certifies in the order convening the Court that, having due regard to the public service, a Field Officer is not available, when he may be a Captain ; or if the Convening Officer certifies a Captain is not available, he may be a Subaltern, **s. 48 (9)** ; except for the trial of a Warrant Officer, when he cannot be under the rank of Captain. **s. 182 (4).** But when a Captain is not available as President, the power of appointing a Subaltern should only be exercised in cases of necessity. **K.R., 618.**

*Rank of Members.*—When the Court consists of only three members, not more than one should be a Subaltern. **K.R., 637.**

*Judge Advocate.*—A fit person *may* be appointed as Judge Advocate ; but it is not usual to have one at a District Court-Martial. **R.P., 101 (A).**

*Jurisdiction.*—All persons subject to military law, except Officers and Warrant Officers holding honorary commissions. **ss. 48 (6), 190 (4).**

*Powers of Punishment.*—Imprisonment with, or without, hard labour not exceeding two years, or any less punishment, **s. 48 (6)** ; except in the case of Warrant Officers, when the only punishments this Court can inflict are : Reprimand ; severe reprimand ; forfeitures ; fines ; stoppages ; dismissal ; reduction to the bottom or any other place in his rank, or to an inferior class of Warrant Officer (if any) ; or reduction to a lower



grade, or, if originally enlisted as a soldier, to the ranks.

**s. 182 (2); A. & A.F. (Ann.) Act, 1920, s. 12 (2).**

*Confirming Authority.*—An Officer authorized to confirm a General Court-Martial, or an Officer authorized to confirm a District Court-Martial by a warrant from the first-mentioned Officer. **s. 54 (1) (c) ; Man., p. 726.**

## CHAPTER X

### JURISDICTION

ALL Officers and soldiers remain subject to the ordinary law, and can be proceeded against in the Civil Courts for offences against that law ; if, however, they have already been sentenced by Court-Martial to punishment for the offence, the Civil Court must, in awarding punishment, take into consideration any punishment already suffered. **s. 162 (1), (2).** If an offender has been dealt with summarily by his Commanding Officer, or by a General Officer, or convicted or acquitted, by either a Court-Martial or a Civil Court, of any offence, he cannot be tried again by Court-Martial for the same offence. **ss. 46 (7), 157, 162 (6).** If, however, the first Court-Martial was illegally constituted, or the Proceedings were not confirmed, then there has been in law no previous conviction, and the accused can be tried again. He should not usually be tried again, and, if re-tried, the Confirming Officer should see that the sentence of the second Court does not exceed the first sentence, and will use his power of remission to secure this. No Officers who were members of the former Court should serve on the second Court. If the Proceedings have been confirmed and were subsequently quashed by superior authority, on the ground of some illegality or serious irregularity in the proceedings, the accused cannot be tried again. **s. 157 (note).** A Non-Commissioned Officer who has been convicted by a Civil Court of any offence, though he cannot be tried and reduced by Court-Martial for the same offence, can, however, be reduced by order of the Army Council, or the Commander-in-Chief in India, if the Brigade Commander considers such course advisable. **s. 183 (2) ; K.R. 568.**

If he is only an acting Non-Commissioned Officer, the Commanding Officer can take away his acting rank.

**s. 183 (c).**

Under the Army Act the jurisdiction of Courts-Martial with respect to the trial of different offences is unrestricted, and it is not imperative under the Act to try any particular offence by Court-Martial. **K.R., 608.**

An offender may be tried by Court-Martial at any place within the jurisdiction of an Officer authorized to convene General Courts-Martial, although the offence was not committed at that place, **s. 159**; but he cannot be sentenced to any severer punishment than he was liable to at the place where the offence was committed.

**s. 160.**

A Court-Martial, wherever held, is not subject as regards its proceedings to any law or ordinance, other than the law of the United Kingdom.

**s. 127.**

As a rule, the jurisdiction of Civil Courts is local; *i.e.*, the offender must be tried within the jurisdiction where the offence was committed; but a Court of Summary Jurisdiction may try any offence against the Army Act (except those declared to be misdemeanours or indictable offences), either at the place where the offence was committed or where the offender may be at the time of trial.

**s. 166 (1).**

An Officer who is a Peer is subject to the jurisdiction of a Court-Martial for the trial of an offence against military law, and cannot claim his privilege of trial by his Peers, which privilege, even in civil law, only extends to the trial of treason or felony.

**Simmons, p. 31.**

No person can be tried by Court-Martial for an offence against the Army Act which was committed more than three years before the date of trial, except the offence is mutiny, desertion, or fraudulent enlistment. If a soldier has served in an exemplary manner for three years, *i.e.*, without an entry in his Regimental Conduct

Sheet, **K.R., 547**, he cannot be tried for desertion (other than on active service), or for fraudulent enlistment committed before the commencement of such exemplary service ; but if the offence was fraudulent enlistment, all service prior to such enlistment will be forfeited. The Army Council may, however, restore any or all of this service under the conditions stated on p. 44. **s. 161.**

Where a conviction for fraudulent enlistment was quashed owing to the accused having served in an exemplary manner, his prior service was nevertheless forfeited under this section.

### *Illustrations.*

1. On the 3rd March, 1923, it is discovered that Serjeant A. embezzled £10 in January, 1920. He is not liable to trial.

2. On the 15th April, 1923, it is discovered that Private B. fraudulently enlisted on the 4th January, 1920, thereby obtaining a free kit. He has not been three years clear in his Regimental Conduct Sheet. He is liable to trial for the fraudulent enlistment, but not for obtaining the kit.

3. Private C. is apprehended on the 23rd May, 1923, for having deserted on the 15th September, 1919, when he was deficient of his kit. He can be tried for the desertion, but not for the deficiency of kit.

4. Private D., having caused a mutiny in his company on the 26th October, 1919, escapes from the guard detention room, and fraudulently enlists into another regiment on the 13th November, 1919. He serves without an entry in his Regimental Conduct Sheet till the 20th June, 1923, when he is recognized by his former Colour-Serjeant. He can be tried for the mutiny, but not for the fraudulent enlistment or desertion.

When a person subject to military law commits an offence, he can be kept in military custody and tried and punished, even though he or his Corps has ceased to be subject to military law. He must, however, be tried within three months of ceasing to be subject, unless the offence was mutiny, desertion, or fraudulent enlistment, in which case he remains liable to trial as just stated. It must be noted that once the three months have expired, liability to trial is not revived by the man again becoming subject to military law. When a soldier has been sentenced by Court-Martial to penal servitude, imprisonment, or detention, the Army Act still applies to him during the term of his punishment, notwithstanding he has been discharged from the Service, and he can be made to undergo his punishment and treated accordingly. **s. 158.**

*Illustrations.*

1. Colour-Serjeant A. is discharged to pension, and immediately afterwards a serious defalcation in his last Pay and Mess Book is discovered. If he can be apprehended, he is liable to trial any time within three months from date of discharge.

2. A soldier of a battalion of the Territorial Army is dismissed from annual training, and it is discovered that when employed as mess waiter he stole some mess property; he is liable to trial any time within three months of the date of dismissal.

The effect of this section is that though a man who has been discharged but is undergoing sentence, cannot be tried for an entirely fresh offence after he ceased to be subject to military law, he can be tried and punished for an offence arising out of the sentence—that is to say, an offence against the rules and discipline of the military prison or detention barrack. He cannot be punished by a Commanding Officer. **s. 184.**

A Non-Commissioned Officer tried under this section after his discharge can, however, only be dealt with as a Private. **O'Dowd, p. 27.**

But, notwithstanding the above rules, proceedings under the Reserve Forces Act, 1882, may be taken against a man of the Army Reserve, whether his reserve service has expired or not, at any time within two months after the offence became known to his Commanding Officer; or, if he is not then apprehended, within two months of his apprehension.

**R.F. Act, s. 26.**

The same provision is made under the Territorial and Reserve Forces Act, 1907, for the trial of a man of the Territorial Army. **T. & R.F. Act, s. 25 (2).**

A Court of Summary Jurisdiction cannot try any offence against the Army Act if it took place more than six months before the proceedings are commenced.

**s. 99 (2) note; Harris, p. 460.**

## CHAPTER XI

### COURT-MARTIAL PROCEDURE

IN this chapter the procedure of the ordinary Courts-Martial will be considered ; the variations from this procedure which are adopted in the case of a Field General Court-Martial will be pointed out in Chapter XIII.

The proceedings are written on an Army Form, and must be free from erasures and interlineations as far as possible ; any such must be verified by the initials of the President ; the pages should be numbered consecutively, and the questions and answers numbered in a single series. **R.P., 95 (A), note 1, App. II, p. 680 ; Man., p. 706, paras. 20, 21.** If there is a Judge-Advocate, he is responsible for their accuracy, custody, and transmission to the authority prescribed in the order convening the Court. If there is no Judge-Advocate, this responsibility devolves on the President. **R.P., 95 (A), 96, 97.** The members take their seats according to army rank. **R.P., 58.** The names of the President and members are recorded in the Proceedings in order of seniority. The President must be the senior combatant Officer, as departmental rank or rank under Art. 165 of the Pay Warrant does not entitle the holder to the presidency of Courts-Martial. **K.R., 186 ; Simmons, p. 9.** Should a member by promotion, during the trial, become senior to another member, other than the President, he will change his place ; but the Officer sworn as President will so continue even though one of the members has become senior to him. **Simmons, p. 211.**

#### PRESIDENT : DUTIES OF.

*The duties of the President* are, to see that the trial is properly conducted, and justice administered, and that

the accused does not suffer any disadvantage from his ignorance of procedure, **R.P., 59** ; to administer the oath to the members of the Court, **R.P., 26** ; to procure any witnesses required, who have not already been summoned by the Convening Officer, **R.P., 78 (A)** ; to put any questions to the witnesses which the Court may ask, **R.P., 85 (A)** ; to close the Court when necessary, **s. 53 (5)** ; to collect the votes of the members on any question to be decided by the Court ; and if the votes are equal to give a casting vote, as explained below, **s. 53 (8), R.P., 69 (B)** ; to sign all documents attached to the Proceedings, **Man., p. 706, para. 19** ; to initial any corrections in the Proceedings, **R.P., 95 (A)** and *note 1* ; to be responsible for their accuracy and safe custody, **R.P., 96** ; to sign the same, and transmit them, as directed, at the end of the trial. **R.P., 45, 50.** If there is a Judge-Advocate, some of these duties devolve on him, as stated below. **R.P., 103 (G).**

#### JUDGE-ADVOCATE.

*A Judge-Advocate* must be appointed at every General Court-Martial, and may be appointed at a District Court-Martial, but in practice this is seldom done. **R.P., 101 (A).** At trials in the United Kingdom he is appointed by a warrant from the Judge-Advocate-General ; before convening the Court, therefore, the Convening Officer will apply to this official to appoint a Judge-Advocate, and will at the same time submit the charge sheet and summary of evidence. Abroad, the warrants issued to Officers, authorizing them to convene General Courts-Martial, give them power also to appoint a Judge-Advocate. **R.P., 17 (A), note 2 ; Man., pp. 722-726.** The Judge-Advocate is not a member of the Court, but merely a legal assessor to advise the Court on points of law, and to act as the ministerial officer of the Court. He is usually an Officer selected for his special knowledge of military law, but he need not necessarily be a person subject to military law. Any grounds which would disqualify an Officer

from being a member of the Court, as presently explained, would also disqualify him from acting as Judge-Advocate at that trial. **R.P., 101 (B)**. But the fact that a Staff Officer had advised the Convening Officer about the case would not necessarily disqualify him from acting as Judge-Advocate, though it would be preferable to appoint another Officer if possible. The accused has no right to object to the Judge-Advocate. **R.P., 25 (B)**. If the Judge-Advocate dies, or is incapacitated from attending during the trial, another fit person may be appointed ; but the Court cannot go on in the absence of a Judge-Advocate, when one has been appointed. **R.P., 65 (B), 102.**

His *duties* are, to advise the Prosecutor, or the accused, on any point of law he may submit ; to represent the Judge-Advocate-General ; to inform the Court of any defect in the charge, or any irregularity in the proceedings ; to remain entirely impartial ; to take care the accused suffers no disadvantage through ignorance, **R.P., 103** ; to swear the Court and all witnesses, and summon any of the latter not summoned by the Convening Officer, **R.P., 26, 78 (B), 82 (A)** ; to sum up at the conclusion of the case, unless he and the Court consider it unnecessary, **R.P., 42 (A), 103 (E)** ; to keep the record of the proceedings, and sign and transmit them to the proper authority. **R.P., 45, 50, 95 (A), 96.**

The Court should be guided by any opinion given by the Judge-Advocate on any point of law, and should not overrule it, except for weighty reasons. The Court are responsible for their decisions, but they may incur great risk by disregarding his opinion on any legal point ; they may, if they wish, record in the Proceedings that they have decided in consequence of his opinion. **R.P., 103 (F).**

#### PRELIMINARY PROCEEDINGS.

*The time* at which the Court opens is entered in the Proceedings. Courts sit at such hours between 6 a.m. and 6 p.m. as may be ordered ; usually between 10 a.m.



and 4 p.m., or 11 a.m. and 5 p.m.; they should not be required to sit more than six, or, at most, eight hours in a day, because all parties would become weary. **K.R., 640.** If the Court think it necessary, they may continue their sitting beyond 6 p.m., but must enter their reason for doing so in the Proceedings. In cases requiring an immediate example, a Court may sit at any hour of the day or night, if the Convening Officer or the Officer in command, certifies *under his hand* that it is necessary. This certificate must be signed by the Officer personally; a Staff Officer cannot sign it for him. A Court may also sit on Sunday, Christmas Day, or Good Friday; if the Convening Officer or superior authority certifies that military exigencies require it. **R.P., 64.** Once the accused has been arraigned, the Court should continue the trial from day to day, but they may adjourn from time to time, when necessary, under the Act or Rules of Procedure. **R.P., 65 (A).**

The Court must adjourn in the absence of the President or Judge-Advocate, or if reduced below the legal minimum, or if the accused is unable to attend. **s. 53 (1), (2); R.P., 65 (B).** They may also adjourn if the number detailed are not present when the Court assembles, **R.P., 18 (B)**, or to procure the attendance of a witness, **R.P., 79**, or to allow the accused further opportunity of preparing his cross-examination of a witness. **s. 53; R.P., 84 (B).**

The Court may also adjourn to view any place, but they must take the Prosecutor and accused with them. **s. 53 (7); R.P., 63 (B).**

The order convening the Court is read, is marked so as to identify it, signed by the President, and attached to the Proceedings. **R.P., 22 (A).** The order must be free from alterations and erasures as regards the composition of the Court. Where any change in the detail is required a fresh order must be issued. **K.R., 638.** It may here be remarked that all documents which are intended to form part of the Proceedings must be similarly marked and signed, and, with the exception

of the charge sheet, attached at the end of the Proceedings in the order in which they are produced before the Court. The charge sheet is inserted after page B in the Proceedings. **Man., p. 706, paras. 17, 18.** If an original document cannot be spared for this purpose, a copy must be compared with the original, and so attached. **K.R., 642.**

All documents should be read by a member of the Court (or by the Judge-Advocate, if there be one). **R.P., 39 (note 4).**

The charge sheet and summary of evidence are laid before the Court by the President, to whom they have been sent by the Convening Officer. **R.P., 17 (E).**

The Court now satisfy themselves as to their (a) legal constitution and (b) jurisdiction.

As regards (a), they must see that :—

- (i) So far as they can ascertain, they have been properly convened.
- (ii) The Court consists of not less than the legal minimum ; and, except as stated below, of not less than the number detailed.
- (iii) Each of the Officers is “eligible,” and not “disqualified.”
- (iv) The President is of required rank and duly appointed.
- (v) In the case of a General Court-Martial, the Officers are of required rank.
- (vi) If there is a Judge-Advocate, he has been duly appointed, and is not disqualified.

If not satisfied, they must adjourn, and report to the Convening Authority. **R.P., 22.**

If the order appears on the face of it to be in order, the Court can accept it. **Man. V, 36.**

If on assembly it is found that the number detailed is not available, the Court should ordinarily adjourn for fresh members to be appointed ; but if they consider

it advisable to proceed they may do so, recording their reasons, provided always they are not reduced below the legal minimum. **R.P., 18.**

One or more waiting members are usually detailed at a General Court-Martial and sometimes at a District Court-Martial to take the place of an absent Officer or to meet reduction by challenge (*vide infra*, p. 126). A waiting member must not serve if all those originally detailed are available. **K.R., 637.**

An Officer is not *eligible* to sit on a Court-Martial unless he is subject to military law, and has the required service for the particular description of Court. **R.P., 19 (A), (C).** When Officers of the Navy or Air Force are subject to military law, they are eligible if they have the required service, their commissions in those Services being taken into consideration. A commission in the Special Reserve, Militia, Yeomanry, Volunteers, Territorial Army, Colonial Forces, or Indian Volunteers is included when reckoning the period of service required.

An Officer is *disqualified* from sitting on any particular trial if he is :—

- (i) The Prosecutor.
- (ii) A witness for the prosecution.
- (iii) The Convening Officer.
- (iv) The Confirming Officer.
- (v) The Commanding Officer of the accused or of the Corps or Battalion to which he belongs. This includes any Officer who has been in command of the accused between the date the charge was made and date of trial.
- (vi) The Officer who investigated the case.
- (vii) The accused's Squadron or Company Commander who made the preliminary inquiry into the case.
- (viii) The Officer who took the summary of evidence.

(ix) A member of a Court of Inquiry which investigated the facts of the case.

(x) Personally interested in the case. This specially includes the *smallest financial* interest.

**ss. 50 (2), (3), 54 (4), note 4 ; R.P., 19 (B).**

Even though legally eligible and not disqualified, Officers should not be detailed as members until competent to fulfil this duty. They are to attend for instruction such Courts as the Officer Commanding the Station directs for two years from date of first joining the Service. **K.R., 632.**

Whenever a Court of Inquiry has been held respecting a matter on which a charge is founded, the President is to enter in red ink and sign a footnote to the effect that he has compared the names of the Officers who served on the Court of Inquiry with those detailed to serve on the Court.

**R.P., App. II, p. 561.**

When a new trial has been ordered, no Officer should be a member of the Court who was a member of the Court at the previous trial. **R.P., 19 (B), note 4.**

### *Illustrations.*

1. Private A. is for disposal at orderly-room ; his Captain, B., inquires into the facts of the case ; he is brought up before Major C., who, in the absence of Colonel D., the Commanding Officer, is taking orderly-room that day. He remands him for trial, and the summary of evidence is prepared by the Adjutant, Lieutenant E. Colonel D., Major C., Captain B., and Lieutenant E. are all disqualified from sitting on the Court.

2. Private A. is absent for twenty-one days. Lieutenant B. is a member of the Court of Inquiry held to record his illegal absence. A. is subsequently apprehended and tried for desertion. Lieutenant B. is disqualified from sitting on the Court.

3. Private A. attacks Serjeant B. and injures him seriously. A Court of Inquiry is held to record the circumstances under which Serjeant B. was injured, of which Court, Major C. is President. A. is tried by Court-Martial for striking his superior Officer. Major C. is disqualified from serving on the Court.

4. A mess waiter is tried for stealing a piece of plate belonging to the Officers' Mess ; every Officer who is a member of that mess is disqualified from sitting on the Court.

As regards (b) they must see that—

(i.) The charge appears to be laid against a person subject to military law and to the jurisdiction of the Court.

- (ii.) Each charge discloses an offence against the Act and is properly framed.

If not satisfied they must adjourn and report to the Convening Officer. **R.P., 23.**

#### PROSECUTOR.

The *Prosecutor* takes his place, and his name is recorded in the Proceedings. He must be subject to military law, and is, in practice, an Officer. **R.P., 24.** In a difficult case the Convening Officer should detail a specially qualified Officer. **K.R., 633.** He is an Officer of justice, whose duty it is to assist the Court in determining the truth, not to obtain a conviction unfairly ; he must act fairly towards the accused, and bring out in evidence any facts that tend in favour of the accused, as well as those against him. It is the duty of the Court to stop him if he refers to any irrelevant matter or indulges in any undue violence of language. **R.P., 60 ; K.R., 636.** He informs the Court, immediately before the arraignment, if the accused has elected to be tried. It is also his duty to inform the Court if the accused will suffer any additional punishment consequential to the finding besides that awarded by the sentence of the Court ; **R.P., 46 (E).** He cannot be objected to by the accused. **R.P., 25 (B).** He can make an opening address ; he examines the witnesses for the prosecution, and cross-examines those for the defence ; if the accused does not call witnesses in his defence, the Prosecutor may address the Court a second time for the purpose of summing up ; if the accused has called witnesses, he may reply to the accused's case for the defence. He should not, except on active service, give evidence, except to prove a date or other formal matter, or to produce documents. If it is necessary for him to give evidence, he must be sworn and should be the first witness. **R.P., 39 (and notes), 40, 41.** This does not apply when Counsel appears on behalf of the Prosecutor. **R.P., 89 (D).**

If the accused has not already been present during these preliminary proceedings, he is now brought before the Court. If an Officer, Warrant Officer, or Non-Commissioned Officer, he will be under the charge of an Officer or Non-Commissioned Officer, and if of lower rank under charge of an escort. **K.R., 641.**

Except during such times as the Court is closed for the consideration of any question, all the proceedings must take place in open Court and in the presence of the accused. When the Court is closed no person may remain in Court except the members, the Judge-Advocate, and any Officers under instruction. Any infringement of this rule would be a ground for quashing the proceedings. **R.P., 63.**

When the Court is open, the general public, military or civil, must be admitted, so far as there is accommodation, and no restriction is put on the admission of press reporters. **Man., V, 71.** But it has been decided that a Court-Martial has inherent power to sit *in camera* if such a course be necessary for the safe and proper administration of justice.

**R. v. Lewes Prison (Governor), 1918.**

#### COUNSEL.

Either the Prosecutor or the accused may have *Counsel* to assist him at a General Court-Martial or a District Court-Martial, but abroad, only with the sanction of the Army Council, or Commander-in-Chief in India, or the Convening Authority. **R.P., 88.** At home, Counsel will not be engaged for the prosecution without the sanction of the Army Council, which is only given in exceptionally difficult cases, and very rarely when the offences are purely military. When application is made to the War Office for Counsel, a copy of the charge sheet, summary of evidence, and the reasons for wanting Counsel, must accompany the application. **K.R., 634, 635.** The accused must usually give seven days' notice of his intention to

employ Counsel, and similarly seven days' notice must be given to him of the intention to employ Counsel for the prosecution. **R.P., 89 (A).**

By the term "Counsel" is meant a barrister, advocate, solicitor, or law agent. **R.P., 93 (B).** Counsel are bound by the Rules of Procedure, and if they are guilty of unprofessional conduct can be reported to a Civil Court. **s. 129 ; R.P., 92.** A Counsel has all the rights and duties of the party for whom he appears. **R.P., 89—91.** It has been ruled by the General Council of the Bar that a barrister must not appear as such unless instructed by a solicitor, but this ruling does not apply to an Officer, who happens to be a barrister, appearing as "friend" of the accused. A barrister should wear his robes when appearing as Counsel.

The accused may also be assisted by a "friend"; and if this friend be an Officer subject to military law, he has the rights of a Counsel; otherwise he can only advise the accused, but cannot himself address the Court or examine witnesses. **R.P., 87.**

It is the duty of the Convening Officer to ascertain whether the accused, if not otherwise represented, desires to have an Officer assigned to assist him at his trial, and if he does, to insure that, if possible, the accused is assisted by a suitable Officer. If, however, owing to military exigencies, there is, in his opinion, no such Officer available, he will send a written notice to the President, which will be attached to the Proceedings. The provisions of this rule in nowise derogate from the rights of an accused person as to Counsel above mentioned. **R.P., 87A, 87B ; A.O.  $\frac{439}{20}$ .**

#### CHALLENGE.

The names of the President and members are now read over in the hearing of the accused, and they severally answer to their names, and the accused is then asked whether he objects to be tried by any of them. **s. 51 (1), (6) ; R.P., 25 (A).** He cannot object

to the whole Court collectively, though he can object to every individual Officer on it. If he objects to the President, the objection against him will first be considered ; if to members, other than the President, the objection against the junior member will first be disposed of. **R.P., 25 (E).** The Officer objected to withdraws and takes no part in deciding the objection. **s. 51 (2).** The accused states the grounds of his objection, and may call witnesses in support ; but they do not give evidence on oath, as the Court, not being yet sworn, has no power to administer an oath. **R.P., 25 (D)** and *note 4.* The Prosecutor can call witnesses to rebut the evidence adduced by the accused. The Court then come to their decision in closed Court. If the objection is to the President, and one-third of the members are in favour of it, it is allowed ; if to a member, it is not allowed unless one-half are in favour of it. **s. 51 (3), (5).** If the Court disallow the objection, their decision is communicated to the accused, and the trial proceeds. If an objection against the President is allowed, the senior member will adjourn the Court and report to the Convening Officer, who will appoint a fresh President. **s. 51 (4).** If an objection against a member is allowed, and there are waiting members, one of them will be taken. **s. 51 (5) ; R.P., 25 (G).** If there are no waiting members, and the Court is reduced below the legal minimum, they must adjourn for a fresh member to be detailed, **s. 53 (1) ;** otherwise, if not below the legal minimum, they may go on with the reduced numbers if they think it expedient, as already noted. **R.P., 18 (A).** Whenever a Court adjourns for a fresh President or members to be appointed, the Convening Officer may, if he thinks fit, convene a fresh Court instead. **R.P., 18 (B).** No new member can be added to a Court once the trial has commenced. The accused must be given an opportunity of challenging any Officers detailed to take the place of those objected to.

**s. 51 (4), (5) ; R.P., 25 (H).**



The Court are then sworn. If there is a Judge-Advocate, he first administers the oath to the President, and then to each of the members: if there is no Judge-Advocate, the President first administers the oath to the members, and then one of the members does so to the President. The Oaths Act, 1909, made a change in the form of all oaths and in the manner of administering them. The oath is now administered by the person taking it, holding the New Testament in his uplifted hand, and saying the words: "I swear by Almighty God that . . .," followed by the words of the particular oath prescribed by law. **9 Edw. VII, c. 39, s. 2.** He holds the book in his ungloved right hand. All stand up while the oath is being administered, all those present in Court, except those on duty under arms, removing their head-dresses.

**R.P., 26, 30 note.**

The obligations undertaken by the Court on being sworn are: First, those of a jury, *i.e.*, that they will well and truly try the accused according to the evidence; next, those of a judge, *i.e.*, that they will impartially administer justice according to the Army Act; and, lastly, that of secrecy, *i.e.*, that they will not divulge the sentence before confirmation (except as the Army Council may direct to communicate the sentence to the accused), or the vote of any member at any time unless required by law to do so.

**s. 52 ; A. (Ann.) Act, 1918, s. 6.**

If there is a Judge-Advocate he is then sworn to secrecy: and if the services of a shorthand writer or interpreter are necessary, these officials are also sworn to do their duty impartially to the best of their power. **R.P., 27.** The accused is given an opportunity of objecting to either of these last two before they are sworn, **R.P., 72 (c)**, but he cannot object to the Judge-Advocate. **R.P., 25 (B).** A party to the trial may apply for the presence of a private interpreter, and ask the Court to hear his version of any disputed interpretation of the evidence. **Man.. V. 70.**

If the accused is ignorant of the English language and is not defended by Counsel, the evidence must be translated to him, and compliance with this rule cannot be waived by the accused. If he is defended, he or his Counsel may intimate that the evidence need not be translated, but the Court should only permit this if satisfied that the accused substantially understands the evidence.

**Archbold, p. 193.**

Young Officers are required to attend Courts-Martial for the first two years after they join the Service, **K.R., 632** ; and, if any such are present, they are now sworn to secrecy, as they are allowed to remain in Court when it is closed.

**R.P., 27 (B).**

If any person who is required to take an oath in connexion with a Court-Martial objects on conscientious grounds to do so, or states that it would have no binding effect on his conscience, then he may be permitted to make a solemn declaration instead. This will have the same effect as taking an oath, and he can be punished for falsehood as though he had sworn falsely. **s. 52 (4)**. In any case, an oath may be administered in such form and with such ceremonies as the person may state will be, according to his religion, binding on him. Abroad, in the case of natives, it will be well to follow the customs adopted in the local Civil Courts.

**9 Edw. VII, c. 39, s. 2 ; R.P., 30 (and note).**

A Court may be sworn to try any number of accused persons then before it, whether they are to be tried separately or jointly, each having the right to challenge any of the Court before they are sworn. But the Court must be sworn in the presence of each accused person, who is to be tried, as the words of the oath are to "try the accused *before* the Court." If the accused are to be tried separately, the Court will then proceed with one case, and then take the others in succession afterwards. If any of the accused has objected to any member of the Court, the Court can be sworn to try

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the others, and his case can be postponed till the objection has been dealt with. **R.P., 71.** Any number of accused persons may be jointly tried for an offence they are charged with having committed collectively, but any of them can claim separate trial on the ground that the evidence of one or more of the accused about to be tried with him is material to his defence, and if the Convening Officer or the Court is satisfied that this is so, his claim must be allowed. **R.P., 15.** If they are tried together, each will have a separate right of challenge, will make a separate plea and defence, and the finding and sentence must be separately recorded.

**R.P., 71** (and *note*).

It is usual to order the witnesses out of Court at this stage.

#### ARRAIGNMENT.

The accused is arraigned by each charge in the charge sheet being read over to him, and his pleading to it. **R.P., 31.** If the accused has elected to be tried, instead of being dealt with by his Commanding Officer, the Prosecutor now informs the Court of that fact. **R.P., App. II, p. 682.** If the accused on arraignment on a charge in which he is described by number, rank, name and unit, pleads to the charge without objecting to his description, the Court is entitled to assume that he is the soldier so described; but if he raises any question as to his identity, it must be established by evidence. The accused, on being called on to plead, may object to any charge on the ground that it does not disclose any offence against the Act or is not properly framed, and the Court will decide whether his objection is valid or not. **R.P., 32.** If there appears to be any mistake in the name or description of the accused, the Court can amend the charge sheet at any time during the trial. If, however, the charge is defective in any other way, the Court must, if they have not begun to examine witnesses, adjourn, for the Convening Officer to make the amendment.

If they have begun to examine witnesses, the charge sheet cannot be amended at all ; but justice can often be done by a special finding. **R.P., 33, 44** (B), (C).

### *Illustrations.*

Private A. is charged with losing by neglect certain articles of his kit, among others, a pair of socks, but the evidence shows that the socks are not deficient ; the Court can find him guilty of the charge, " with the exception of one pair of socks."

Private B. is charged with breaking out of barracks on the 12th August, but the evidence shows he did so on the 13th August ; the Court can come to a special finding and correct the date in their finding.

Before pleading to a charge, the accused may offer a "*special plea to the jurisdiction of the Court*" ; that is, that they have no power to try him at all on any charge whatever. He may adduce evidence on oath in support of this plea, and the Prosecutor can call evidence in reply. If the Court over-rule his objection, they go on with the trial ; if they allow it, they will adjourn and report to the Convening Officer (this finding does not require confirmation). If in doubt as to whether they should allow it, they may adjourn and refer to the Convening Officer for his advice, or, if this delay would be inconvenient, they may record a special decision, and proceed with the trial, subject to their having jurisdiction. **R.P., 34.** The usual grounds for such a plea would be that the accused was not subject to military law, or not amenable to that description of Court, as, for example, if he were a Warrant Officer holding an honorary commission and the Court were a District Court-Martial. **s. 190 (4) ; R.P., 23** (A).

When called on to plead, he may plead "*guilty*" or "*not guilty*." Before recording a plea of "*guilty*," however, the Court must be quite satisfied that the accused fully understands the meaning and consequences of his plea and the difference in the procedure which it entails. If they are not satisfied on this point, they will proceed with his trial as though he had pleaded "*not guilty*." It must be recorded in the Proceedings that this Rule has been adhered to. If he refuses to plead, or does not plead intelligibly, a plea of "*not guilty*" will be recorded. **R.P., 35.**

If, when called upon to plead, the accused appears insane, the Court would take evidence as to his mental condition, and if satisfied that he is unfit to take his trial they would find to this effect (*vide* p. 141), and the President would sign the Proceedings and transmit them for confirmation in the usual way, as explained later on. Meanwhile, until the pleasure of His Majesty, as to the disposal of the accused, is known, he must be kept in confinement so as to keep him securely, but is not to be regarded as a criminal.

**s. 130 ; R.P., 57.**

The accused may offer a "*plea in bar of trial*" at the same time as his general plea of "*guilty*" or "*not guilty*." The grounds for such a plea are :—

- (i.) That he has been previously acquitted or convicted by a Civil Court or Court-Martial, or dealt with summarily by his Commanding Officer, or if an Officer under the rank of Field Officer, or a Warrant Officer, has been dealt with summarily by a competent General Officer, for the same offence.

**ss. 46 (7), 47 (5), 157, 162 (6) ;**

**A. & F. (Ann.) Act, 1923, s. 13 (1).**

- (ii.) That the offence has been pardoned or condoned by competent authority.
- (iii.) That more than three years have elapsed since the offence was committed, or, in the case of civil offences in respect of which proceedings must be commenced within any shorter time than three years, that this shorter time has elapsed.

**s. 161 ; R.P., 36 (A).**

The accused can adduce evidence on oath in support of his plea and the Prosecutor can call evidence to rebut it. If the Court allows the plea, they will record their finding and adjourn and report to the Confirming Officer; if they over-rule the plea, they will go on with the trial. If the finding is not confirmed, the

Court may be re-assembled, and the trial will proceed as if the plea had not been allowed.

**R.P., 36 (C), (D), (E).**

The fact of Magistrates having refused to deal with an offence is no bar to the trial of the offender by Court-Martial.

**O'Dowd, p. 139.**

It has been held that the order of a Court of Summary Jurisdiction handing over a deserter to a military escort does not constitute any bar to his trial by Court-Martial.

To be a bar, the previous trial must have fulfilled the following conditions :—

- (i.) The former Court must have had jurisdiction.
- (ii.) The Court must have come to a finding.
- (iii.) If the finding required confirmation, it must have been legally confirmed.
- (iv.) The offence so dealt with must have arisen from the same set of facts and be in substance the same as that charged on the second trial.

It would not be a bar to the second trial if the offence now charged, although committed at the same time and by the same act, were not in substance and degree the same as that previously adjudicated on, and was not known at all, or not known in its effect or degree at the former trial.

**O'Dowd, pp. 165—167.**

Pardon or condonation must be the deliberate act of a person having power to dispose of the offence, acting in his magisterial capacity with a full knowledge of the facts.

**O'Dowd, p. 27.**

It has been ruled that there is no condonation where a conditional release has been granted to an offender and the conditions have not been fulfilled.

### *Illustrations.*

1. Private A. is convicted of desertion, but the Proceedings are not confirmed; he can be tried again on the same charge. **s. 54 (6).**

2. Private B. is acquitted on a charge of murdering a comrade; he cannot be tried again for the manslaughter of the same man. **Harris, p. 404.**

3. Private C. is charged on the 6th November, 1923, with attempting, on the 13th July, 1922, to have carnal knowledge of a girl of 15 years of age, and pleads in bar of trial that more than six months have elapsed since the offence is alleged to have taken place. His plea must be allowed.

48 & 49 Vict., c. 69, s. 5 ; 4 Edw. VII, c 15, s. 27.

If the accused pleads "*Not Guilty*," the Court shall ask him whether he applies for an adjournment on the ground that he has been prejudiced by non-compliance with any of the rules relating to the procedure before trial, or that he has not had sufficient opportunity for preparing his defence. If he makes such application, the Court will hear any statement or evidence he wishes to adduce in support of it and any statement or evidence for the Prosecution in reply, and if it appears to the Court that his application is well founded, they shall grant such adjournment as seems to them reasonable. It must be recorded in the Proceedings that this rule has been complied with.

**R.P., 36 (A) ; A.O.**  $\frac{439}{20}$  ; **A.C.I.**  $\frac{8}{21}$ .

When the accused pleads "*guilty*" to some charges and "*not guilty*" to others, in the same charge sheet, the Court will first proceed with the trial of those charges to which he has pleaded "*not guilty*." If, however, they are *alternative charges*, the Court can enter a plea of "*not guilty*" to those to which he has not pleaded "*guilty*"; or if they think he has pleaded "*guilty*" to the less serious of the alternative charges to avoid the punishment entailed by the graver, they may proceed as though he had not pleaded "*guilty*" to any.

**R.P., 37 (A).**

### *Illustrations.*

1. Private A. is charged with (1) stealing certain property ; (2) receiving the same knowing it to have been stolen. He pleads "*guilty*" to the first charge ; the Court can enter a plea of "*not guilty*" to the second, and proceed as on a plea of "*guilty*."

2. Colour-Sergeant B. is charged with (1) embezzling certain public money ; (2) neglect, to the prejudice of military discipline, in keeping his accounts so negligently that the money had been lost. He pleads "*not guilty*" to the first, and "*guilty*" to the second charge. The Court can proceed as though he had pleaded "*not guilty*" to both.

The accused may at any time withdraw a plea of "*not guilty*" and plead "*guilty*," and if the Court, as already noted, are satisfied he understands what he is doing, they may record the plea and proceed with the remainder of the trial accordingly. **R.P., 38.**

If there are separate charge sheets, the accused will be arraigned, and the trial proceed separately on each charge sheet up to the finding inclusive. The trials on the several charge sheets will be in such order as the Convening Officer directs. If the Convening Officer thinks fit, he can direct that on the accused being convicted of any charge in any charge sheet, he need not be tried on the other charge sheet or sheets, and the Court will then finish the trial as though there were no other charge sheets. Whenever a charge sheet contains more than one charge, the accused can claim to be tried separately on each charge, on the grounds that he would otherwise be embarrassed in his defence, and if the Court think the claim good they should allow it and proceed accordingly. **R.P., 62.**

(A) PROCEEDINGS ON PLEA OF "NOT GUILTY."  
PROSECUTION.

The Prosecutor may, if he wishes, make an opening address, or may hand in a written address. If Counsel has been retained for the prosecution, he should make an opening address. **R.P., 39 (A), 90.**

It may here be generally noted that wherever in the Proceedings any addresses are made, they may be either oral or written. When the address is oral, only so much of it as the Court think necessary need be recorded, provided that such a record of anything said for the defence must be kept as will enable the Confirming Officer to judge of the defence; and whenever the Prosecutor or the accused requests that any particular matter in his address be recorded, the Court should enter it in the Proceedings. Whenever the



address is written, it will be read, marked with some identifying mark, signed by the President, and attached to the Proceedings. **R.P., 95 (D), App. II, p. 679.**

The witnesses for the Prosecution are then called, sworn, and examined by the Prosecutor. **R.P., 39.**

Military witnesses are ordered to attend by their Commanding Officer; the attendance of civilians is secured by a summons, which is usually served on them by the Police. This summons is signed either by the Convening Officer, Judge-Advocate, President, or the Commanding Officer of the accused. For form *vide* **R.P., App. II, p. 699.** **s. 125 (1) ; R.P., 78.**

A civilian witness cannot be compelled by subpoena to attend a Court-Martial held in a foreign country; nor is evidence taken on commission admissible before a Court-Martial. **s. 126 (note 4).**

The allowances for the expenses of witnesses are laid down in the Allowance Regulations as amended by an Army Council Instruction. The claims of civilian witnesses must be certified by the President as being just and reasonable. **A.R., 373, 374.**

Every witness (including one producing documents) must be sworn by one of the Court, or the Judge-Advocate when there is one; or he may make a solemn declaration under the circumstances before noted. **s. 52 (3) ; R.P., 30, 82 (A) ; Man., p. 705.** If a witness refuses to be sworn, or to answer questions or produce documents, which he can legally be required to answer or produce, he may, if subject to military law, be arrested, in order to be proceeded against under s. 28; and if a civilian, his offence can be certified, by the President, to a Civil Court, who will deal with the contempt as though it had taken place before that Court. **s. 126 (1) (and note 3).**

The evidence of all witnesses is taken down in a narrative form, as nearly as possible in the words used; but wherever the Prosecutor, accused, Judge-Advocate, or the Court think it material, the exact question and

answer are to be recorded *verbatim*. If the evidence is given in a foreign language, the greatest care should be taken to ensure a faithful translation, the interpreter rendering the very words as closely as possible. The interpretation into English will be recorded, unless it is required that the words be taken down *verbatim*, in which case they must be recorded in the equivalent English character, when the language has a peculiar alphabet, or as near the sound as may be when it is not a written language, and the interpretation into English added. **R.P., 95 (B)** and *note 2*. If any objection is made to any evidence, the Court may, if they think fit, record the proposed evidence, and the fact that it had been objected to, and their decision upon the objection. **R.P., 95 (c)**. During any discussion on such an objection or as to the evidence of a witness, the witness should be directed to withdraw.

**R.P., 81.**

When the examination-in-chief is ended, the accused can cross-examine the witness, who, if necessary, may be re-examined by the Prosecutor. **R.P., 84 (A)**. Details as to the method of conducting these various examinations of witnesses will be dealt with in a subsequent chapter on "Evidence" (*vide pp. 159 et seq.*). Any member of the Court or the Judge-Advocate may, with the permission of the Court, ask any witness any questions; such questions should usually be put after the parties to the trial have finished the examination or cross-examination of the witness. **R.P., 85 (A)**. These questions may be put at any time before the second address of the accused, and a witness may be recalled at the request of either party for this purpose, and will be examined on his former oath. The Court may, if they think fit in the interests of justice, call or recall any witness at any time before the finding. **R.P., 86**; but neither the Prosecutor nor the accused can claim this as a right. **O'Dowd, p. 11**. Every question may be put direct to the witness by the person asking it. The evidence of each witness is read

to him at the conclusion of his examination, to see that it has been recorded correctly and to give him an opportunity of correcting slips. It should be recorded in the Proceedings that this has been done.\* **R.P., 83.** The witness will then withdraw, as, except the Prosecutor and the accused, no other witness should be in Court while another witness is under examination.

**R.P., 81.**

The examination of all the witnesses for the Prosecution is conducted in a similar manner. The Prosecutor is not bound to call all the witnesses whose evidence is in the summary, but he should call any whom the accused wants called, in order to give him an opportunity of cross-examining them. **R.P., 75.** If he wishes to call a witness whose name is not in the summary, he must give reasonable notice to the accused of his intention, or the Court may allow an adjournment to enable the accused to prepare his cross-examination, or allow the cross-examination of this witness to be postponed; and they must inform him of his right to such adjournment or postponement.

**R.P., 76.**

After the assembly of the Court, the President is the person to procure the attendance of any witnesses who may be required.

**R.P., 78.**

#### DEFENCE.

At the close of the Prosecution, the accused will be called upon for his defence, and will be informed of his right to give evidence himself (he must be warned that if he does so he will be liable to cross-examination); and he will be asked whether he wishes to call any witnesses for his defence. **R.P., 40.** The subsequent procedure will vary according to his replies to these questions. The different cases will now be considered in turn.

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\* If the Court is a General Court-Martial, at which a shorthand writer is employed, the Court may record in the Proceedings that they and the Judge Advocate consider it unnecessary to comply with this rule. **R.P., 83 (c).**

(i.) *The Accused calls Witnesses in Defence.*

The accused can make an opening address ; and the rules already noted for the opening address for the Prosecution apply, except that the accused is allowed more latitude in his remarks than would be permissible to the Prosecutor. If, however, he makes groundless charges against the witnesses or other innocent parties, he can be tried for making false accusations ; but such a course would be very exceptional. The Court should caution him if his defence is irrelevant. **R.P., 60 (c) and note ; Man. V, 82.**

He may then give evidence himself, if he wishes, and call his other witnesses in turn, including those to character. The rules for the conduct of the examination of witnesses for the Prosecution apply to those for the Defence, except, of course, they are examined by the accused and cross-examined by the Prosecutor. If the accused wishes to give evidence himself, he should usually do so first, before he has heard the other witnesses give their evidence. He is not compelled to do this, but the Court of Criminal Appeal has considered it most important that the accused should be called before any of his witnesses. He should be warned that if he does not do so the value of his evidence may be considerably lessened. Unless the Court decides that there are reasons against it (such as his violent conduct), the accused, while giving evidence, will do so from the place where the witnesses stand. **R.P., 80 (2).**

After all the evidence for the defence has been taken, the accused can make a second address, summing up his case ; and, lastly, the Prosecutor is entitled to make a second address, replying to the whole case.

**R.P., 41 (and notes).**

(ii.) *The Accused gives evidence himself, but calls no other Witnesses (except as to character).*

The accused will give his evidence as above described. The Prosecutor can then make a second

address, summing up the evidence for the Prosecution and commenting on the accused's evidence. The accused may then make an address in his defence. He may also call any witnesses as to character. **R.P., 40** (and *note 5*). The Prosecutor may rebut this evidence as to character by producing proof of previous convictions, or the accused's Conduct Sheet, and may call witnesses to prove such, but he cannot again address the Court. **R.P., 40 (E), 86 (C).**

(iii.) *The Accused calls no Witnesses (except as to character).*

The Prosecutor will make his address (if any) at once; but he must not comment on the fact of the accused declining to give evidence. The accused can then make an address in his defence and call any witnesses as to character as in the last case, and the Prosecutor has the same right of rebutting any such evidence.

**R.P., 40** (and *note 5*); **61 & 62 Vict., c. 36, s. 1 (b).**

If the accused is assisted by Counsel, or an Officer having the rights of Counsel, and does not wish to give evidence himself, but wishes to give his own account of what happened, he will do so at the close of the prosecution, and before any address made by such Counsel. His address, like all others, can be oral or written, but he is not sworn, and no question may be put to him by the Court or any other person. If he makes such a statement, the procedure will be the same as in (i.) above. **R.P., 94.**

At the conclusion of the whole case the Judge-Advocate, if there is one, will sum up, unless he and the Court agree that a summing-up is unnecessary, which decision must be entered on the Proceedings. **R.P., 42 (A), 103 (E).** After this, no other address will be allowed, and the Court will be closed to consider their finding. **R.P., 42 (B), 43 (A).**

## FINDING.

Each member must give his opinion on each charge, commencing with the junior. **R.P., 43 (B), 69.** A majority of the Court decides, but if the votes are equal, the accused is given the benefit of the doubt, and acquitted. **s. 53 (8).** The finding of acquittal on any charge, but not all the charges in a charge sheet, is pronounced in open Court before the Court proceed to consider the sentence ; and if the acquittal relates to all the charges in a charge sheet, the President dates and signs the Proceedings, and the accused is brought in, and the finding read to him in open Court, and he is released at once.

**s. 54 (3) ; A. & A.F. (Ann.) Act, s. 14 ;**

**R.P., 45 A ; A.O.  $\frac{439}{20}$ .**

Where, however, the Court come to a special finding (*vide infra*), e.g. “ *not guilty* of desertion, but *guilty* of absence without leave,” this does not amount to an acquittal and the finding should not be communicated to the accused until the Proceedings are promulgated in the usual manner.

The finding will be recorded as a finding of “ *Guilty*,” “ *Not Guilty*,” or “ *Not Guilty and honourably acquit him of the same*.” This last formula, however, should only be used when the offence charged against the accused is disgraceful and such as to tarnish his reputation, and when the accused has come through the ordeal of the trial without the least stain on his character.

**R.P., 44 (A), and note 1.**

The Court may also record a “ *Special Finding*.” The most usual cases for this are—(1) when they find the facts proved in evidence differ from the particulars in the charge, but that the difference is not so material as to have prejudiced the accused in his defence; (2) under the provisions of s. 56 of the Army Act, which allows a Court to find a person, charged with certain offences, guilty of other cognate offences therein named ; (3) when there are alternative charges, and

the Court are in doubt as to which charge the facts proved amount to, they may refer to the Confirming Authority for an opinion, or, if this is impossible, may come to a finding of facts and declare the accused guilty of whichever charge these facts in law constitute ; (4) they may find the accused guilty, but insane at the time he committed the offence ; (5) they may find that by reason of insanity the accused is unfit to take his trial. **ss. 56, 130 ; R.P. 44** (and notes), **57 (A).**

If the Court find that a man charged with desertion is "*Not guilty*" of that offence but "*Guilty*" of absence without leave, he is finally acquitted of desertion, and if the Proceedings are not confirmed, he could only be tried again for the absence. If the finding were merely an acquittal of the desertion, he could not be retried even for absence without leave.

A special finding of insanity at the time of committing the offence does not amount to a conviction, therefore the forfeitures consequent on a conviction will not be incurred ; *i.e.*, (1) pay is not forfeited under R.W. 856 for the period the accused has been in confinement awaiting trial ; (2) when the charge is desertion or fraudulent enlistment, no prior service is forfeited under s. 79 ; (3) when the charge is desertion or absence without leave, pay is not forfeited under R.W. 856 for the period of absence.

### *Illustrations.*

1. Private A. is charged with selling his tunic, two shirts, and a towel. There is no evidence to show that he sold the towel. The Court can find him "*Guilty of the charge with the exception of one towel.*"

2. Private B. is charged with striking Serjeant C. with a poker. The evidence shows that he struck him, but the instrument was a stick and not a poker. The Court can find him "*Guilty of the charge, with the exception that he struck Serjeant C. with a stick and not a poker.*"

3. Corporal D. is charged with desertion. He calls evidence to show that he stopped away to nurse a sick wife, and that as soon as she was better he returned and surrendered himself. The Court can find him "*Guilty of absence without leave.*"

4. Private E. is charged with absence without leave from 1st March, 1923, to 24th April, 1923. He calls evidence to prove that he was admitted to a Military Hospital on the 13th April, 1923, and was only discharged therefrom on the day he surrendered, 24th April, 1923. The Court can find him "*guilty*" of absence without leave from 1st March to 13th April, 1923.

5. Private F. is charged with absence without leave from 10th March, 1923, to 24th April, 1923. The evidence proves that he was absent till the 30th April, 1923. The Court can *not* find him "guilty" of absence beyond the 24th April, 1923.

6. Serjeant G. is charged with wilfully allowing a soldier in arrest to escape. The evidence shows that the escape was due to the Serjeant forgetting to lock the door of the detention room. The Court can find him "Guilty of, without reasonable excuse, allowing a soldier in arrest to escape."

7. Private H. is charged with pawning certain articles of his kit. There is no evidence in proof of the pawning, but only of the fact of the deficiency. The Court can *not* find him "Guilty of losing, by neglect, these articles."

8. Private I. is charged with, 1st, stealing goods the property of a comrade; 2nd, receiving the same knowing them to have been stolen. The evidence proves certain facts as to the accused being in possession of the articles soon after they were missed, but the Court are in doubt as to whether these facts legally amount to theft or receiving stolen goods. They can come to a finding of facts, stating "that the accused did *so and so*, but are in doubt whether these facts constitute, in law, the first charge, or second charge, and therefore they find him guilty of whichever charge these facts amount to."

### (B) PROCEEDINGS ON PLEA OF "GUILTY."

The Court will find the accused "*Guilty*," and will record the finding in the Proceedings. As has already been noted, before accepting the accused's plea of "*Guilty*," the Court must be quite satisfied that he fully understands the nature of such plea. If the trial has proceeded on other charges on the same charge sheet, to which he has pleaded "*Not Guilty*," those charges to which he has already pleaded "*Guilty*" will be read to him again on the Court being reopened.

**R.P., 35 (B).**

The summary of evidence will then be read, marked, and signed by the President, and attached to the Proceedings. If there is no summary, sufficient evidence will be taken to enable the Court to determine their sentence and to allow the Confirming Officer to know the circumstances under which the offence was committed.

**R.P., 37 (B).**

The accused may then make any statement he wishes in mitigation of punishment, and, if necessary, the Court may allow him to give evidence himself or to call witnesses in support of his statement. **R.P., 37 (F) ; 61 & 62 Vict., c. 36, s. 1 ; Archbold, p. 444.** He can also call witnesses as to character.

**R.P., 37 (c).**



If, from the statement of the accused, or the summary, it appears that after all he did not understand the nature of his plea of "*Guilty*," the Court must alter the record and proceed as though he had pleaded "*Not Guilty*."

**R.P., 37 (D).**

If the accused is arraigned on separate charge sheets, the Court will, subject to the directions of the Convening Officer, try him on the charges in all the charge sheets before proceeding as directed in the last two paragraphs.

**R.P., 62 (F).**

#### PROCEEDINGS ON CONVICTION.

In any case, where the Court has convicted the accused of any charge, whether in consequence of his plea of "*Guilty*" or after a plea of "*Not Guilty*," they may, before determining their sentence, take evidence as to his previous character and service.

**R.P., 46 (A).**

This evidence must always be taken unless it is impracticable to do so, in which case the Court will record the reasons. **R.P., 46 (A) note 1.** It has, however, been ruled that the omission to take such evidence does not invalidate the sentence.

**Simmons, p. 272, note 6.**

This evidence is usually given by an Officer, generally the Prosecutor, handing in the "Statement as to character and service of the accused," referred to in Chapter VIII. This document must be signed by the Officer having the custody of the regimental books from which it is compiled. **s. 163 (1) (h).** The witness producing this Statement must, of course, be sworn, and he must identify the accused as the person named in the Statement, and declare that he has compared the statements with the Regimental books and found them true extracts. The accused can cross-examine this witness, and can call for the books to be produced, and can call witnesses to rebut the evidence thus given against him, and after all this evidence is finished can address the Court thereon.

**R.P., 46.**

If the finding of the Court renders the accused liable to any exceptional punishment in addition to that awarded by the Court, the Prosecutor must call attention to this fact, and the Court must inquire into the nature and amount of such extra punishment ; *e.g.*, forfeiture of service by a soldier of the Territorial Army on conviction of desertion. **T. & R.F. Act, s. 20 (3).**

When any offence is unusually prevalent attention should be periodically called to the fact in District or Garrison Orders, and not by special directions to Courts-Martial ; and in determining their sentence on a man found guilty of such offence a Court should take into consideration the fact that such warning has been issued.

**R.P., App. II, p. 695 ; K.R., 645.**

#### SENTENCE.

The Court will now be closed to consider their sentence. The Court will pass one sentence in respect of all the charges on which the accused has been convicted. **R.P., 48.** Every member must give his vote for the sentence, even though he had been individually in favour of an acquittal. The sentence must be determined by a majority of the Court, except that sentence of death cannot be passed unless two-thirds at least of the members are in favour of it. **s. 48 (8).** When the opinions of the members as to the *nature* of the punishment differ, and various punishments are suggested, the most lenient punishment named must be put to the vote first, and, unless a majority of the Court are in favour of that, then the next most lenient, and so on till some one punishment has been determined by a majority. Similarly, if opinions differ as to the *amount* of the punishment to be awarded, a similar course will be adopted ; in each case the voting will begin with the junior member.

**R.P., 69.**

#### *Illustrations.*

1. On a General Court-Martial, consisting of nine members, four vote for death, three for penal servitude, and two for imprisonment. The imprisonment will now be first put to the vote and will be negatived, only two voting for it. Now the penal servitude will be put ; naturally, those members who

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wished to only give imprisonment will vote for it rather than for death, hence five will now vote for it, and, this being an absolute majority of the Court, penal servitude will be the punishment awarded.

2. In fixing the amount, four members vote for ten years, one for seven years, two for five years, and two for three years. The three years will first be put to the vote and will be lost, only two being in favour of this amount; next, five years will be put, and as this will only obtain four votes, this will be negatived; next, seven years will be put, and, as five members will now be in favour of this amount, this will be the award.

In determining their sentence, the Court should consider the nature of the offence, and the service and previous character of the accused, and must bear in mind any aggravating or extenuating circumstances, and the prevalence of any particular crime in any Garrison or Corps; they must also have regard to the climate and locality where the accused will have to undergo his sentence, and to any consequences involved by their finding or sentence, in addition to the punishment awarded by them. Care must be taken to discriminate between offences due to youth or temper and those showing premeditated misconduct. The K.R., para. 645, give rules as to the amount of detention or imprisonment which should usually be awarded for the various offences therein named, and Courts-Martial should not depart from these amounts without good reason.

**K.R., 645.**

When the sentence is death, the President will at the conclusion of the trial communicate the sentence forthwith to the accused on a special Army Form under sealed cover, and will attach a certificate to the Proceedings that this has been done. **A.C.I.**  $\frac{570}{18}$ .

Sentences of imprisonment or detention must be framed as follows :—

- (1) Terms of imprisonment or detention, not amounting to six months, will be awarded in *days*.
- (2) Terms of one year or two years will be awarded in *years*.
- (3) All other terms will be awarded in *months* or *months and days*.

**K.R., 647.**

The word "month" in a sentence of imprisonment, detention, or field punishment, is interpreted as a "calendar month."

**R.P., 134 (c).**

It is necessary for the Court to state "with hard labour" in the sentence if such is intended, as unless this is so specified hard labour cannot be inflicted.

**Archbold, p. 234.**

If it is considered necessary to award a sentence of imprisonment, discharge with ignominy should be added.

**K.R., 645 (iv).**

A Court will not sentence a soldier to forfeitures when he is *convicted* of desertion, fraudulent enlistment, or an offence under s. 17 or 18; or when he is *sentenced* to penal servitude or discharge with ignominy; as in such cases the forfeitures are absolute under the provisions of the Royal Warrant in consequence of the conviction or sentence.

**R.W., 942, 944, 957, 1008 (b), (c), (d),**

**Man., p. 697 (note).**

The forfeitures which a soldier suffers *as a consequence* of his conviction or sentence, without any award by the Court, may be summarized as follows:—

- (i) Service towards discharge—when convicted of desertion or fraudulent enlistment, or when trial for these offences is dispensed with.  
**s. 79 (2).**
- (ii.) Qualifying service, *i.e.*, service towards pension—when convicted of desertion or fraudulent enlistment; or when sentenced by Court-Martial to discharge with ignominy; or when discharged in consequence of being sentenced to penal servitude or on conviction by a Civil Court.  
**R.W., 1008 (b), (d).**
- (iii.) Medals and decorations—Forfeiture of decorations or the D.C.M., M.M., or M.S.M. is dealt with by the Warrants instituting

them. War medals and Good Conduct medals (with gratuity) are forfeited by :—

- (a) An Officer, when he suffers death by sentence of Court-Martial, or when sentenced to be cashiered or dismissed the Service.
- (b) A soldier, when he suffers death by sentence of Court-Martial, or when he is discharged with ignominy or in consequence of being sentenced to penal servitude, or on conviction by a Civil Court. **R.W., 631, 1118.**

- (iv.) Good conduct badges—*One* for every conviction by Court-Martial or a Civil Court ; *all*, when convicted of desertion or fraudulent enlistment or an offence under s. 18, or when sentenced to discharge with ignominy, or more than six months' imprisonment (by either Court-Martial or Civil Court) ; or when discharged in consequence of being sentenced to penal servitude or on conviction by a Civil Court.

**R.W., 490, 942—944.**

In awarding stoppages, a Court must take care not to sentence the accused to any greater deduction than will make good the loss or damage occasioned by his offence as averred in the particulars of the charge and proved in evidence. **s. 138 (b) ; R.P., App. I (23).** In cases of fraudulent enlistment, if the accused is charged with obtaining a kit to which he was not entitled, the Court will sentence him to pay the value ; in cases of deficiency of kit the Court will only sentence him to stoppages for those articles which are Government property, which should have the values stated in the charge.

**K.R., 620, 623—625.**

If a Court recommend an accused to mercy or for the restoration of any service necessarily forfeited on conviction of desertion or fraudulent enlistment, they

must give their reasons for such recommendation, and may, if they think fit, enter in the Proceedings the number of votes by which any such recommendation was lost or carried. **s. 79 ; R.P., 49.**

As a Court has an absolute discretion as to the sentence, except on conviction on a charge under s. 16, or of murder a recommendation to mercy is seldom necessary ; but might be required where a serious offence has been committed, and though the Court consider a severe sentence necessary to mark their sense of its gravity, they think that, owing to the offender's previous good character or for other exceptional reasons, he should not suffer the full penalty. **Man., V, 88.**

The Proceedings will then be dated and signed by the President, and by the Judge-Advocate (if any), and transmitted to the Confirming Authority as directed in the order convening the Court. **R.P., 50.** In the United Kingdom the Proceedings of General Courts-Martial are to be sent direct to the Convening Officer, who will forward them with his remarks to the Judge-Advocate General. If the sentence requires confirmation by the King, the Judge-Advocate-General will send the Proceedings to the Secretary of State for His Majesty's confirmation. In other cases the Judge-Advocate-General will, after reviewing the Proceedings, return them to the Confirming Officer for necessary action. **K.R., 657.**

## CHAPTER XII

### CONFIRMATION ; AND PROMULGATION OF SENTENCES

ALL findings and sentences of Courts-Martial, except a finding of acquittal, require confirmation by the Officer having power to confirm the Proceedings of such Court, and until so confirmed are of no effect. **s. 54 (3), (6).** The authorities having power to confirm the different descriptions of Courts-Martial have already been stated in Chapter IX. The minute of confirmation or non-confirmation should be in the hand-writing of the Confirming Authority. **Clode, Mil. Law, p. 168.** In the event of not confirming, the reasons for non-confirmation may be added if the Confirming Officer wishes.

**R.P., App. II, p. 699.**

As soon as the Confirming Officer receives the Proceedings, he should, normally, at once order the release of the accused if the sentence is less than *dismissal* in the case of an Officer, or less than *discharge with ignominy* in the case of a soldier. If the sentence includes forfeiture of seniority or reduction, orders should be given that the accused is not to be put on any duty until after promulgation, unless the exigencies of the Service demand it ; in such cases he may be placed in open arrest instead of being released.

**K.R., 650.**

No Officer can confirm the Proceedings of a Court-Martial (other than a Field General Court-Martial) of which he was a member, and if he should become the Confirming Officer, he must refer them to a superior Officer having authority to confirm the Proceedings of such a Court ; or in a Colony, where there is no such superior Officer, to the Governor, who in such a case can confirm the Proceedings. **s. 54 (4).**

The Confirming Authority, at any time before promulgation, may cancel his minute of confirmation made under a misapprehension, and rewrite the minute on reconsideration or order a revision. **Simmons, p. 298 ; O'Dowd, p. 161.** It has been ruled that a Confirming Officer when confirming has no power to enter a special finding on any charge in substitution for the finding of the Court. He can only confirm or refuse confirmation of such finding.

### (i.) REVISION.

A Confirming Officer can send back the finding, or sentence, or both, for revision once, but only once. **s. 54 (2) ; R.P., 51 (B).** In this case, the Court reassembles, pursuant to the order, and, if possible, all the original members must be present. If the President is absent or the Court is reduced below the legal minimum, there can be no revision ; and the Court must adjourn and report to the Confirming Officer. The proceedings are conducted in closed Court, and the Court cannot take any fresh evidence. If the sentence only is sent back for revision, they cannot alter the finding ; if the finding is revised, and the new finding requires a sentence, the Court must pass sentence afresh, even though in the words of the former sentence, as the revocation of the finding, *ipso facto*, revokes the sentence, and unless the Court pass a fresh sentence the accused will have no sentence to undergo. The Court can, if they think right, adhere to their former finding or sentence. **R.P., 52 ; App. II, p. 698.** The sentence cannot be increased on revision, though it can, of course, be reduced ; but where the first sentence was a nullity, it is not an increase to pass a valid sentence on revision. **s. 54 (2).**

A finding of “ *not guilty* ” cannot be revised, even if the finding of “ *guilty* ” on an alternative charge is not confirmed. **s. 54 (3), note 6.**



### *Illustrations.*

1. A Court having found a Corporal "*guilty*" of two charges and sentenced him "to be reduced to the ranks," the Confirming Officer sends the finding back for revision, on the ground that there is not sufficient evidence to convict on the second charge. The Court, on revision, being of this opinion, "revoke their former finding and find him '*guilty*' on the first charge, '*not guilty*' of the second charge." They must now pass a fresh sentence, which must not be more than the first one.

2. A Court having sentenced a Serjeant to be reduced to the rank of Lance-Serjeant; the sentence is sent back for revision as being a nullity (there being no such rank); the Court can now sentence the prisoner to be reduced to the ranks and imprisonment, as this is not an increase of a *former* sentence, there having been no legal sentence at all in the first instance.

3. A Court having sentenced a Corporal to be reduced to the rank of Lance-Corporal and to be fined one pound, the sentence is sent back for revision, part of it being a nullity; the Court now cannot add anything to the former sentence, which was partly legal, *i.e.*, the fine; hence, the fresh sentence cannot be more than a fine of one pound, as a sentence of reduction to the ranks would be an increase of the first one.

4. A private soldier is arraigned on two alternative charges; first charge, stealing goods the property of a comrade; second charge, receiving the same goods, knowing them to have been stolen. The Court find him "*guilty*" of the first charge, and "*not guilty*" of the second. The Confirming Authority refuses confirmation on the first charge; the accused cannot now be found "*guilty*" of the second charge.

If the accused has made statements in mitigation of punishment which might influence the Confirming Officer as to the sentence, the latter should, if possible (unless such a course will cause substantial delay), make inquiry as to the truth of the statements before confirming the Proceedings. **K.R., 653.**

If the Confirming Officer wishes to comment on the proceedings, his remarks will not form part of the Proceedings, but will be made in a separate minute to the Court, or in exceptional cases published in Command Orders. He cannot comment on the inadequacy of the sentence, and must be careful not to interfere with the judicial discretion of the Court. In the case of a finding of acquittal which requires no confirmation, the Officer, who would otherwise have confirmed, cannot make any remarks in the Proceedings; but if he thinks anything in the case requires notice, he must make a separate report to the Army Council. In no case can he comment on a finding of "*not guilty*."

**R.P., 51 (A) ; K.R., 652, 654.**

If an Officer who has not power to do so, by error purports to confirm, such confirmation and subsequent promulgation are void, and the Proceedings can still be confirmed by the proper Authority. **s. 54, note 2.**

(ii.) APPROVAL BY CIVIL GOVERNORS.

In certain cases the sentence must be approved by the Civil Authority, in addition to the usual confirmation by the Military Authority. In India, sentence of death for treason or murder (except on active service), or of penal servitude for a civil offence, must be approved by the Governor-General, and, in a Colony, sentence of death for any offence (except on active service), and of penal servitude for a civil offence, requires approval by the Governor of the Colony.

**s. 54 (7), (8), (9).**

(iii.) PROMULGATION.

The Proceedings of all Courts-Martial (except when the accused has been acquitted of all the charges) are to be promulgated in such manner as the Confirming Officer directs, or according to the custom of the Service. **R.P., 53.** The charge, finding, sentence, recommendation to mercy (if any) and minute of confirmation must be communicated to the accused. Promulgation will only be made by these particulars being read out on parade when the Confirming Officer so directs. **s. 53 (9); K.R., 658 (i).** When the Proceedings have not been confirmed they must, nevertheless, be promulgated. The date of promulgation is entered on the Proceedings.

**R.P., App. II, p. 699.**

If before promulgation, the accused escapes and is declared a deserter by a Court of Inquiry, promulgation may be made by publication of the above particulars in Part II Orders of the Unit; if he subsequently surrenders or is apprehended they will be communicated to him.

**K.R., 658 (iii).**

After promulgation the Confirming Officer is *functus officio*, and has no further powers *qua* Confirming Officer, but he may be one of the Officers mentioned in s. 57 (2), and has the powers therein given (*vide* p. 245 *infra*).

No alteration can be made in the record of the Proceedings after promulgation. **O'Dowd, p. 162.**

The result of a Court-Martial (whether a conviction or acquittal) is to be published in the orders of every formation in which the order convening the Court appeared, and in the orders of the unit to which the accused belongs. **K.R., 658 (ii).**

Anyone who considers himself aggrieved by the finding or sentence of the Court may forward a petition through the usual channel to the Confirming Officer or any revising Authority. If this petition raises any question of law, it should, at home, be referred to the Judge-Advocate-General.

**K.R., 656.**

## CHAPTER XIII

### FIELD GENERAL COURTS-MARTIAL

THIS Court can only be convened on active service or beyond the seas, when it is not practicable to convene a General Court-Martial ; but if the troops are not on active service, it can only try an offence committed against the person or property of an inhabitant of the country.

**s. 49 (1).**

*Convening Authority.*—Any Commanding Officer of a Corps or body of troops ; but, except on active service, the Commanding Officer should not convene unless authorized by the General Officer Commanding the Forces to which he belongs. It should be noted that the convening order must be signed by the Convening Officer personally.

**s. 49 (1) ; R.P., 105 (B).**

*Legal Minimum.*—Three Officers, if possible ; if not, then two.

**s. 49 (1) (b).**

*Service Required.*—Each Officer should have held a commission for at least one year, but it has been ruled that Officers with less service sitting on the Court will not invalidate the Proceedings. If Officers of three years' service are available, they will be detailed in preference.

**R.P., 106 (c).**

*Corps of Members.*—May belong to the same or different Corps ; the provisions of R.P., 20, do not apply.

**s. 50 (1).**

*Rank of President.*—Not below Field Officer, unless the Convening Officer is below that rank or is of opinion that a Field Officer is not available, when he must be a Captain, unless a Captain is not available, when he may be a Subaltern. The Convening Officer may preside, but whenever practicable he should appoint another Officer as President.

**s. 49 (1) (c) ; R.P., 106 (B).**

**Rank of Members.**—The members may be of any rank, and the restrictions laid down in s. 48 (7) do not apply. **s. 49 (2).**

**Judge-Advocate.**—The Convening Officer, although not authorized to appoint a Judge-Advocate at other Courts-Martial (*vide ante*, p. 118), may appoint a fit person to act as such at a Field General Court-Martial.

**R.P., 106 (E) ; A.O.  $\frac{489}{20}$ .**

**Jurisdiction.**—All persons subject to military law, under the circumstances stated above. **s. 49 (1).**

**Powers of Punishment.**—If the Court consists of not less than three members, it has the powers of a General Court-Martial; if of only two members, then not exceeding imprisonment or field punishment. **s. 49 (1) (d).** The provisions of the Royal Warrant relating to forfeitures do not authorize a Field General Court-Martial to award them. **R.W., 941, 956, 1009.**

**Confirming Authority.**—Any Officer authorized to confirm a General Court-Martial; or, on active service, any Officer authorized by the Rules of Procedure to confirm a Field General Court-Martial, provided that sentence of death or penal servitude is not to be carried out until the decision of the Commander-in-Chief in the field is known, or unless, owing to the nature of the country, great distance, or operations of the enemy, delay is impracticable, when the sentence may be carried out if confirmed by the General or Field Officer Commanding the Force with which the accused is present. **s. 54 (1) (d) ; R.P., 120 (D), (E).**

A member of a Field General Court-Martial can only confirm if he has power to do so, and if he considers that it is not practicable to delay the case for reference to any other Officer. The Provost-Marshal, or an Assistant Provost-Marshal, or the Prosecutor, cannot confirm the Proceedings of a Field General Court-Martial. **R.P., 120 (B), (C).**

As already noted in Chapter IV, the restrictions as to the trial of certain serious civil offences by Court-Martial do not apply to a Field General Court-Martial.  
**s. 49 (3).**

#### DIFFERENCES IN PROCEDURE OF A FIELD GENERAL COURT-MARTIAL.

The ordinary Rules of Procedure, except Rules 54, 56, 97, 98, 99, and 100 (which apply as if a Field General Court-Martial were a District Court-Martial), **R.P., 121**, do not apply to these Courts, but the procedure is regulated by **R.P., 105-123**. The principal differences are as follows, in all other cases the procedure being similar to that of the ordinary Courts already considered in Chapter XI :—

The Court may be convened and the Proceedings recorded in a special form, given in the second Appendix to the Rules of Procedure, which is very much shorter than the form used for ordinary Courts, but if possible a short summary of the evidence of each witness is to be recorded and attached to the Proceedings. If the Convening Officer considers that military exigencies or other circumstances prevent the use of even this abbreviated form, the Court can be carried on without any writing, except that the Provost-Marshall or his assistant, if present, or in their absence the President, must keep such a record as is possible, giving at least the name or description of the accused, the charge, finding, sentence, and any recommendation to mercy, with the minute of confirmation. The Convening Officer must report what the circumstances were which prevented the use of the prescribed form.

**R.P., 107, 114 (c).**

The grounds of disqualification which prevent Officers serving on a General or District Court-Martial do not apply to a Field General Court-Martial, **s. 50 (3)** ; but the following are disqualified from sitting on the

Court :—the Provost-Marshal, Assistant Provost-Marshal, the Prosecutor, or a witness for the prosecution. **R.P., 106 (D).**

Instead of a regular charge sheet, the charge may be made briefly in any language sufficient to describe the offence and show that it was one against the Army Act. **R.P., 108.** But in all charges of a general nature, such as an offence against an inhabitant of the country, under s. 6 (1) (*f*), or an offence under s. 40, particulars must be given sufficient to let the accused know exactly what the offence is which he has to answer.

In the event of a challenge, if the objection is allowed by any one member of the Court, it is enough to carry it. **R.P., 110 (B).**

Sentence of death cannot be passed unless the Court are unanimous. **s. 49 (2) ; R.P., 118 (A).**

If at any time during the trial the Court consider that any person should be tried by an ordinary Court, they may strike his name out of the Schedule or list of accused ordered to be tried by them.

**R.P., 119 (B).**

## CHAPTER XIV

### EVIDENCE

EVIDENCE includes all legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. There is a wide difference between *evidence* and *proof*—the latter being the effect of evidence. When the result of evidence is the undoubting assent to the certainty of the proposition which is the subject matter of the inquiry, such proposition is said to be proved.

**Powell, pp. 1, 419.**

The region of evidence lies between moral *certainty* on the one hand, as its most perfect extreme, and moral *possibility* on the other, as its most imperfect extreme. It does not look for more than the first, and it will not act on less than the last.

**Powell, p. 421.**

In a criminal trial the issues must be proved beyond a reasonable doubt.

**Phipson, p. 5.**

There are several divisions of evidence, such as divisions into (1) primary and secondary, (2) direct and indirect or circumstantial, (3) oral, documentary, and real. These divisions are explained later on. The following is an illustration of what is meant by “real” evidence. The production in Court of a knife, covered with blood, which has been found near the body of a murdered man, is offering *real* evidence. **Powell, p. 7, 159.** This last is sometimes called *inspection* and includes the comparison of handwriting, and estimating the credibility of a witness from his demeanour while under examination, and determining the age of a child or young person under the Children Act.

**Child. Act, s. 123 ; Phipson, p. 4.**



The rules of evidence are those which regulate the manner in which questions of fact may be determined for judicial purposes. Courts-Martial follow the same rules as are in force in the ordinary Courts of Criminal Jurisdiction in England, and are not subject to any local law of evidence in force in the place where they may be sitting.

**ss. 127, 128 ; R.P., 73 ; Man., VI, 1.**

Authors of textbooks on the Law of Evidence treat the subject in various ways, but in the following pages the method adopted in the "Manual of Military Law" has been followed, as that work is the one with which Officers will be most acquainted.

#### (i.) WHAT MUST BE PROVED.

With certain exceptions, the charge, as stated in the charge sheet, must be proved, and unless the evidence supports this, the accused must be acquitted, even though it may have been shown that his conduct amounted to some other offence.

The exceptions are (1) where the distinction between the two offences is one of degree, in which case an accused charged with the more serious offence may be convicted of the less, *e.g.*, where an accused charged with murder is found guilty of manslaughter; and (2) where the distinction between the two offences is merely technical, *e.g.*, an accused charged with stealing may be found guilty of embezzlement, and *vice versa*. Section 56 of the Army Act provides for cases of both these kinds, and allows a person charged with certain offences to be convicted of other offences of similar nature only technically distinct, and in any case allows an accused, charged with committing an offence under circumstances involving a higher degree of punishment, to be convicted of the offence, committed under circumstances involving a less degree of punishment. It has been ruled that under this section a person charged with murder can be found guilty of manslaughter.

**s. 56 ; Man., VI, 8.**

*Illustrations.*

1. Private A. is charged with desertion ; the evidence shows that, though absent, he intended to return ; the Court can convict him of absence without leave.

2. Colour-Serjeant B. is charged with embezzlement ; the evidence shows that the crime was really larceny ; the Court can convict him of stealing.

3. Serjeant C. is charged with wilfully allowing a person committed to his charge to escape ; there is not sufficient evidence to show that the offence was committed wilfully ; the Court can convict him of negligently allowing a person committed to his charge to escape.

4. Private D. is charged with selling his kit ; there is no evidence to show he sold the articles ; the Court cannot convict him of losing them by neglect.

5. Private E. is charged with absence ; the evidence clearly shows that the offence really amounted to desertion ; the Court can only convict him of absence.

It is sufficient if the substance of the charge is proved. Minor details, which are not essential to the constitution of the offence, may be treated as surplusage. As a rule, dates and places are immaterial, but in certain charges time and place are material, and must be proved as stated, *e.g.*, in a charge of a sentry asleep on his post ; but in any case the discrepancy between the dates stated in the charge and those proved in evidence must not be too great, or the Court cannot convict. If the substance of the charge is proved, the Court can convict, and by a special finding can correct any immaterial discrepancies.

**R.P., 44 (B) ; Man., VI, 9 ; Powell, p. 525 ;  
Simmons, pp. 348-351.**

*Illustrations.*

1. Private A. is charged with losing by neglect his tunic, a flannel shirt, and two pairs of socks ; the evidence shows that only one pair of socks is deficient ; the Court can find him guilty of the charge, " with the exception of one pair of socks."

2. Private C. is charged with striking Corporal C. with a poker ; the evidence shows the instrument used to have been a stick ; the Court can convict, curing the defect by a special finding.

3. Private D. is charged with using insubordinate language to a superior on the 3rd November ; the evidence shows the offence took place on the 4th November ; the Court can convict.

4. Private E. is charged with absence from the 13th to 23rd August ; the evidence shows that he was absent from the 13th to 23rd October, and not August ; the Court must acquit him, as the divergence between the two dates is so great it amounts to a new charge.

5. Private F. is charged with absence from the 1st to 21st July ; the evidence shows that he was arrested by the Civil Police on the 14th July and sentenced to a week's imprisonment for drunkenness ; the Court can convict him of the charge " with the exception that the absence terminated on the 14th and not on the 21st July."

6. Private G. is charged with absence from the 1st to 14th July ; the evidence shows that he was absent till the 21st July ; the Court can only convict him of the charge as laid.

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Certain facts are assumed to be known to the Court, and do not require to be proved in evidence. The Court is said to take "*judicial notice*" of these facts. The principal matters so judicially noticed are: Public Acts of Parliament, the general proceedings of Parliament, the rules of practice of the Supreme Court of Judicature, the Accession of the King, the existence of any State and Sovereign recognized by the King, certain Seals, the extent of the British Empire, the commencement and termination of war between the King and any other Sovereign, the divisions of time, etc. **R.P. 74 ; Man., VI, 11 ; Stephen, Art. 58.** Courts-Martial would also take judicial notice of the relative rank of Officers and Non-Commissioned Officers, and the general duties appertaining to various officials ; also as to whether an Officer were "in the execution of his office" or not ; that a command given in connexion with military duty is a lawful command ; whether it was the duty of an escort to apprehend a soldier ; whether the Officer granting leave to a soldier or ordering the release of a person in custody had authority to grant the leave or give the order ; etc. **ss. 15 (note 11), 20 (note 1) ; Man., VI, 10 ; O'Dowd, p. 15.** The Rules of Procedure are judicially noticed by all Courts, civil and military. **s. 70 (3).**

## (ii.) BURDEN OF PROOF.

In considering upon which side the burden of proof or disproof of a criminal charge lies, the first rule is that the law presumes everyone to be innocent until legally convicted ; therefore the duty of disproving a charge against him does not fall upon the accused, until the Prosecutor has brought forward evidence establishing facts from which his guilt will be inferred, unless he explains away this presumption of guilt raised against him. The second rule is that he who states any fact must prove it. Hence, taking these two rules together, the burden of proof will at first lie on that party against whom the judgment of the Court would

be given if no evidence at all were produced. In certain cases the law requires an accused to prove any lawful excuse, or authority, or the absence of fraudulent intention ; and this is especially so when the matter is peculiarly within the knowledge of the accused. The burden of proof as to any particular fact lies on the person wishing the Court to believe it, unless the law provides that proof of this fact shall lie on any particular person.

As the trial proceeds, the burden of proof may shift from the Prosecutor to the accused, and then back to the Prosecutor.

On proof of an unlawful act having been committed by the accused, the law presumes a guilty intention, and the onus of proving any justification or excuse lies on the accused. The law, moreover, always presumes that anyone intends the usual and natural consequences of his act.

**Man., VI, 12-14 ; Stephen, Arts. 93-96 ;  
Harris, p. 402.**

### *Illustrations.*

1. Serjeant A. is charged with releasing a person committed to his charge without due authority ; the fact of this person having been released having been proved, the burden of proving that he had proper authority will rest on A.

2. Private B. is charged with absence without leave ; the absence having been proved, the burden of proving that he had leave will rest on B.

3. Private C. is charged with stealing a pipe belonging to Serjeant D. ; the burden of the proof is on the prosecution ; evidence shows that the pipe was found in his possession soon after the theft took place ; the burden of proof is shifted to C. ; he proves that he bought the pipe from Private E., who represented that it was his ; the burden of proof again shifts to the prosecution.

4. Private F. is charged with the murder of a comrade ; the burden of proving any fact which will reduce the offence to manslaughter, or will justify the killing, rests on F.

5. Private G. is charged with stealing certain property. The stolen goods are found in his quarters ; it will be for him to account for their being there.

On the other hand, where the evidence raises a strong presumption of guilt, but such presumption is one "of fact," it is not strictly correct to say that the burden shifts. The law recognizes this, for example, by saying that upon proof of recent possession of stolen goods, a jury *may* convict if no satisfactory explanation as to their possession is offered by the accused.

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*Illustration.*

1. Private A. is charged with stealing a watch the property of a comrade, Private B. ; and it is proved that soon after B. reported the loss, A. was arrested and searched and the watch found on him. In the absence of any satisfactory explanation by A., this would be strong presumptive evidence that he stole the watch.

**(iii.) ADMISSIBILITY OF EVIDENCE.**

The chief rule as to the admissibility of evidence is that it must be relevant ; that is, that it must tend to prove or disprove the charge. **R.P., 73 (A).** No hard and fast line can be drawn between facts that are relevant and those that are not, but each case must be treated on its own merits, in accordance with the following general rules. **Man., VI, 16.**

Evidence is not admissible to show a general disposition to commit a crime ; thus, on a charge of murder, evidence could not be given to show that the accused had attempted to murder *another* person, and thus was of a murderous disposition, but, as will be shown hereafter, evidence would be admissible to prove that he had made a previous attack on the *same* person, because that would tend to show his animus against the deceased. But where several offences are connected, then evidence about one is admissible as proof of the other. For example, at the trial of a Colour-Serjeant for desertion, evidence of his having embezzled a large sum would be admissible, as affording grounds to presume that he did not intend to return.

**Man., VI, 17, 20 ; Stephen, Art. 2.**

Any fact connected with the question in issue, or which forms part of the same transaction, is relevant, as are any statements made by, or to, the doer of any act at the time of performance.

**Man., VI, 21 ; Stephen, Arts. 3, 8.**

*Illustrations.*

1. Private A. is charged with stealing from an Officer's quarters : the fact that he was on duty in another part of the garrison at the time the theft took place is relevant.

2. Private B. is charged with desertion ; the fact that he said to a comrade, as he was leaving the barracks, " Good-bye, Tom, you won't see me any more," is relevant.

Facts showing intention, knowledge, good or bad faith, and evidence as to motive, preparation, subsequent conduct, or explanatory statements, are considered relevant, and are admissible. Thus, as has already been pointed out, it is admissible on a charge of murder to prove that the accused made a previous attempt to kill the deceased, as that will show his animus against him. And so the intent in uttering counterfeit coin may be proved by evidence of previous or subsequent utterings, and even the bare possession of several bad pieces of money is evidence of guilty knowledge. **Man., VI, 22—25 ; Powell, pp. 115-117 ; Stephen, Arts. 7, 11.**

### *Illustrations.*

1. Private A. is charged with writing a disrespectful letter to his superior ; after the writing of the letter has been proved, the Prosecutor may prove that he spoke or wrote other disrespectful words to the same superior, to show his deliberate disrespect.

2. Private B. is charged with receiving articles of kit from F., knowing them to have been stolen ; the fact that he had received other articles from F., which he knew were stolen, is relevant.

3. Private C. is charged with attempting to murder his Colour-Serjeant by firing at him on the range ; the fact that the Colour-Serjeant had reported him for misconduct that morning is relevant.

4. Serjeant D. is charged with stealing plate from the Officers' Mess ; the fact that he packed up certain articles of plate in boxes, and had arranged for a carrier to call for them, is relevant.

5. Colour-Serjeant E. is charged with embezzlement ; the fact that he had attempted to desert is relevant.

Evidence tending to show that the accused has been guilty of other criminal acts besides those mentioned in the charge is only admissible in the following cases :—

(1) Where the Prosecution seeks to prove a system or course of conduct ; (2) where the Prosecution seeks to rebut a suggestion of accident or mistake on the part of the accused ; (3) where the Prosecution seeks to prove knowledge of some fact by the accused. Such evidence is, however, never *proof* that the accused committed the act charged, but is only admitted to show the quality of that act or the *mens rea* ; i.e., the guilty intention of the accused. **Man., VI, 93A.**

The Proceedings of a Court of Inquiry, or any confession or statement or answer to a question made at

any such Court are not admissible as evidence against an Officer or soldier, except at his trial for giving false evidence before the Court. **R.P., 124 (L):**

(iv.) **HEARSAY.**

*Hearsay* is "the oral or written statement of a person who is not produced in Court, conveyed to the Court either by a witness or the instrumentality of a document." It will thus be seen that the term includes written statements as well as verbal ones. As a rule, hearsay evidence is inadmissible. The reasons for excluding such statements are: (1) They have no claim to credibility, because not made under the sanction of an oath or its equivalent; (2) the party affected by them has not had the opportunity of cross-examining their author; and (3) the author of the statements is not before the Court, so that they can judge, by his demeanour and manner of giving his evidence as to his credibility. **Man., VI, 46; Powell, p. 264.**

This rule, however, does not exclude statements which have been made in the presence of the accused from being given in evidence; not in proof of the truth of the facts alleged in the statement, but in order to show the conduct of the accused on hearing the statement made. **Man., VI, 48; Stephen, Art. 8.**

*Illustration.*

Private A. is charged with stealing Private B.'s watch; Serjeant C., a witness, states that Private D. told him, in the presence of A., that the watch had been found in A.'s bedding. This statement is admissible to show the conduct of A. on hearing the statement made, but is not evidence that the watch was found as stated.

There are several exceptions to the rule that hearsay evidence is not admissible.

(A) *Dying Declarations.*—On the trial of any person for the murder or manslaughter of another, any statement made by the deceased as to the transaction which resulted in his death is admissible, provided it is proved to the satisfaction of the Court that the declarant was in immediate fear of death and had given up all hopes

of recovery. It is considered that a person in such an awful situation will be as fully constrained to speak the truth as if he had been speaking under the sanction of an oath. The fact that his doctor had not given up hope of the deceased's recovery will not of itself render the declaration inadmissible, provided the deceased himself had no hope of recovery. Such declarations must, however, be very cautiously received; for it must be remembered that possibly the declarant may have been suffering physical or mental exhaustion at the time of making the statement; or the witness repeating it to the Court may intentionally, or from defect of memory, misrepresent what was said; and, in any case, such statements are usually made in the absence of the accused, who has had no opportunity of cross-examining. If time allows, any such statement should be reduced to writing at the time of making, and, if possible, a magistrate or other responsible person should be present to attest the statement; but such a course, though expedient, is not absolutely necessary to render the declaration admissible. Provided the Court is satisfied as to the veracity, consciousness, and sense of religious responsibility, and of impending dissolution in the mind of the declarant at the time of making it, it can be received.

**Man., VI, 49, 50; Powell, pp. 70-76;  
Stephen, Art. 26.**

### *Illustrations.*

1. Private A. is charged with the murder of B. B. makes a statement to the effect that A. had killed him; at the time of making this statement he had no hope of recovery, though his doctor had, and he actually lived a week after making it. The statement is admissible.

2. Private C. is charged with the murder of D. The latter makes a statement which is taken down in writing, and, on this statement being read over, corrects it to: "I make this statement with no hope, *at present*, of my recovery." D. died a few hours afterwards. This statement is inadmissible.

3. Private E. is charged with the murder of F. A death-bed confession by G. that he G. had murdered F. is inadmissible.

(B) *Statements forming part of the res gestæ.*—Statements made during the transaction, which is the subject of inquiry, are admissible, even though made when the accused is no longer present, provided they follow



the incident immediately, so as to form, as it were, one continuous transaction. Statements made by a person as to his bodily or mental feelings may be given in evidence when it is a question as to what his feelings were at that particular time.

**Man., VI, 51-54 ; Stephen, Arts. 8, 11.**

### *Illustrations.*

1. Private A. is charged with striking Serjeant B. The evidence shows that the alleged offence took place in a room when no one else was present. Private C., a witness, states that as he was coming into the room he heard A say, "Take that, you devil!" but he saw no blow struck. This evidence is admissible.

2. Private C. is charged with murdering D. by poison. Statements made by D. as to his feelings and symptoms during the illness preceding his death are admissible.

Statements made after the transaction and not forming part of the *res gestæ* are generally irrelevant, but in cases of rape and similar offences against women the fact that a complaint was made by the woman shortly after the alleged occurrence, and the particulars of her complaint may be given in evidence by the Prosecution, not as evidence of the facts, but as evidence of the consistency of her conduct with the story told by her in the witness-box, and to corroborate the same, as, for instance, to negative consent. **Cockle, p. 76.**

(c) *Statements against self-interest by a person since deceased.*—The interest must be a pecuniary or proprietary one, and the deceased must have had peculiar means for knowing the matter stated. The whole statement is relevant, and not only that part which is against the interest of the deceased. Although the statement is *admissible*, it must be remembered that its *credibility* will depend on the character for veracity of the deceased.

**Man., VI, 55 ; Powell, p. 265 ;  
Stephen, Art. 28.**

### *Illustrations.*

1. Serjeant A. is charged with embezzling money belonging to the Officers' Mess, which was entrusted to him to pay some local bills. A receipted bill, signed by a tradesman since deceased, is admissible in evidence.

2. Private B. is charged with desertion ; a letter from Private C., since deceased, to B.'s mother, that he had procured a disguise for B., and helped him to get off, is inadmissible.

(D) *Statements made in the course of duty by a person since deceased.*—Such statements are admissible, provided they were made at, or soon after, the time when the matter reported occurred, and if the facts were within the personal knowledge of the declarant. Only the essential subject matter of the report or statement is relevant.

**Man., VI, 56 ; Powell, p. 273 ;  
Stephen, Art. 27.**

### *Illustration.*

Private A. is charged with having made a false answer on enlistment as to his age. A statement in the Register of Baptism, made by the clergyman (since deceased), that he was baptised on a certain date is admissible ; a statement in the same register that he was born on a certain date is inadmissible, because it was not part of the clergyman's duty to make it.

### (V.) EVIDENCE AS TO CHARACTER.

Evidence of the accused's bad character cannot be given by the prosecution unless he has called evidence to show he has a good character, in which case the Prosecutor can call witnesses to rebut this evidence. On the other hand, evidence as to character is relevant for the defence, and an accused can always call witnesses to prove his good character, or he may call for the production of his Conduct Sheet. But it must be remembered that the good character he seeks to prove must be more than general—that is, the special virtues he attempts to show he possesses must be such as are antagonistic to the commission of the particular crime with which he is charged. For instance, it would be no use for a man charged with cowardice to prove that he was always a clean, smart soldier and respectful to his Officers ; or, on the other hand, for a man charged with theft to show he had a known character for bravery. The Court of Criminal Appeal has ruled that in strict law the good character of the accused is only to be taken into consideration when the evidence of the other facts in the case leaves the jury doubtful as to his guilt. Care must be taken to understand that, as regards evidence as to character, what is now under

consideration is evidence as to character given *before the finding* with a view to proving or disproving the charge, and this must be quite distinct from the evidence as to character given *after the finding* of guilty, which is only given to assist the Court in awarding a proper sentence.

**Man., VI, 17-19 ; Stephen, Art. 56.**

But evidence of the bad character or previous convictions of a *witness* is relevant and admissible, as it affects his credibility.

**Cockle, p. 270.**

In prosecutions for rape or indecent assault, evidence of the bad character of the woman, against whom the offence is alleged to have been committed, may be given in defence, as these offences may be consented to, and the character of the woman is material to consent.

**Cockle, pp. 112, 113.**

#### (vi.) ACTS AND STATEMENTS OF CONSPIRATORS.

In cases of conspiracy, *e.g.*, mutiny, after proof of the existence of the plot and of the accused's connexion therewith, evidence of anything done, written, or said, in furtherance of the common object, not only by him, but by any other of the conspirators, may be given against him. But such actions or statements cannot be proved if they are not connected with the common object.

**Man., VI, 26, 27 ; Stephen, Art. 4.**

#### *Illustration.*

Private A. is charged with conspiring to mutiny ; a letter from Private B., another mutineer, to a friend, describing their intended plans, is not admissible against A.

#### (vii.) DOCUMENTS MADE EVIDENCE BY THE ARMY ACT.

As already noted, the rule excluding hearsay evidence includes written as well as oral statements, hence letters and other private documents will be excluded under the rule. As regards documents of a public nature, exceptions are made, and entries in public records are admissible as evidence of the facts so

recorded. The Army Act, in particular, makes the following documents evidence of the facts stated against them :—

- (A) The attestation paper or re-engagement paper { is evidence of the person having given the answers therein stated.

Either the “original” or the “duplicate” attestation paper is an original document and admissible for this purpose.

The *enlistment* of a person may be proved by a *certified copy* of the attestation paper.

- (B) A letter or return as to the service of any person in His Majesty's Forces, signed by the Commanding Officer of any unit or ship, { is evidence of the facts in such letter or return.
- (C) An Army List or Gazette, purporting to be published by authority and printed by a Government printer, { is evidence of the status of Officers and their appointments, Corps, etc.

The official *London Gazette* will be judicially noticed on its mere production, provided the whole *Gazette*, and not only a cutting, is produced.

**Phipson, p. 9.**

- (D) Any warrant or order made under the Army Act { is evidence of the matters therein stated.
- (E) Any record made in Regimental books in pursuance of any Act or the King's Regulations or of military duty, signed by the proper Officer { is evidence of the facts therein stated.

The list of documents comprised in the expression Regimental Books is given in K.R. 1671.

- (F) A *copy* of any such record duly certified to be a true copy by the Officer having the custody of the regimental book } is evidence of such record.

It must be noted that in either of these last two cases the record or copy must be signed by the Officer whose duty it is to sign the record, or who has the custody of the regimental book, as the case may be, and not by some other Officer "for" him.

- (G) A descriptive return, signed by a Justice, } is evidence of the matters therein stated.

It must be noted that the *original* document must be produced, and that a certified copy is not admissible, except under the conditions when secondary evidence may be given, as described in the next section. The document is not admissible in evidence unless it is signed by the Justice.

- (H) A certificate signed by the Commanding Officer of any unit, Provost-Marshal, or a Police Officer in charge of a Police Station, as to the fact, date, and place of a deserter or absentee *surrendering* } is evidence of these matters as stated, including the fact that he surrendered in plain clothes, if such be the case.

It must be carefully noted that this document is only made evidence in cases where the accused has *surrendered* and is not admissible when he has been *arrested*. Also that it must be signed by the actual Commanding Officer or Police Officer mentioned in the Act. For form of Certificate *vide* K.R. 579 (c).

The Report sent by the Governor of a Prison, notifying the conviction of a soldier confined in the Prison under sentence of a Civil Court, which

shows the date of arrest on the charge of which he was convicted, is *not* an admissible document to prove the date of arrest of a deserter or absentee.

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| (i) A certificate, signed by the Clerk of the Court or other proper official,  | } | is evidence of the conviction and sentence, or order, or acquittal, by a Civil Court, of any person subject to military law. |
| (j) The Proceedings of a Court-Martial, produced from the custody of the Judge-Advocate-General or other proper Officer, | } | are evidence of the transactions of that Court.  |

**ss. 163-165, and 4th Schedule ; A. Ann. Act, 1917, s. 5 (1) ; Man., VI, 59-62.**

Evidence as to the identity of the person referred to in any of the above-named documents must always be given to the Court.

Where the identity of the accused with the person alleged to have committed the offence is in dispute, evidence, either direct or circumstantial, is required. Identification by finger prints by an expert is allowed, and so is identification by handwriting, even without the aid of experts.

**Denman, p. 315.**

#### (viii.) PRIMARY AND SECONDARY EVIDENCE OF DOCUMENTS.

Primary evidence of the contents of a document is the production of the document itself in Court; secondary evidence is a copy of the document, or the oral account of its contents, given by a witness who has read the original and can swear to its contents. **Man., VI, 32, 36.** It is a rule of evidence that the best evidence obtainable must always be produced, and therefore, in the case of private documents, secondary evidence can never be given when the document is

forthcoming. This includes telegrams ; so that when it is necessary to prove the contents of a telegram, application must be made to the Post Office authorities for the original telegram actually handed in by the sender, and the copy received can only be produced in evidence under the circumstances stated below.

**Man. VI, 30, 31 ; O'Dowd, p. 6 ; Archbold, p. 356**

In the case of public documents, secondary evidence of their contents is, by various Statutes, permitted to be given, by production of properly certified copies, *e.g.*, those mentioned in s. 163 (*h*) of the Army Act.

But it has been ruled that this does not include such documents as defaulter rolls, etc., so that when their contents are pertinent to the issue, the document itself must be produced and a copy attached to the Proceedings.

**Man., VI, 34, 37.**

When it is necessary to prove that a soldier was a defaulter at the time he committed an offence, a certified true copy of the record of the punishment taken from the Guard Report or Minor Offence Report must be produced and attached to the Proceedings. (For Form *vide* K.R., 643.)

The chief occasions on which secondary evidence of a private document may be given are :—

- (a) When the original appears to be in the possession of the adverse party, who, after having been duly served with a notice to produce it, refuses to do so.
- (b) When it appears to be in the possession of a stranger, who refuses to produce it.
- (c) When due search has been made for the original, and it appears to be lost or destroyed. It must be shown that proper search has been made. What is proper search will depend on the nature and value of the document.

- (d) When it is of such a nature as not to be easily removable into court, *e.g.*, a writing chalked on a fence; an inscription on a tomb-stone; or when it is in a country from which it is not permitted to be removed.
- (e) An entry in a banker's book, for which special provision is made by a Statute.

**Man., VI, 35 ; Stephen, Art. 71 ; Cockle, p. 318.**

When evidence is called proving that a letter was properly addressed, stamped, and posted, and has not been returned by the Post Office, it is presumed to have been delivered in due course. This presumption may be rebutted; and if the receipt is denied, it will be for the Court to decide whether to accept the denial.

**Cockle, p. 83.**

Every document produced in evidence must be properly "put in", *i.e.*, produced to the Court by a witness who has himself been sworn.

**Man., VI, 105 note, and p. 705.**

It must be remarked, in connexion with the rule as to best evidence, that the law does not require the fullest possible proof of a fact to be given. As a rule, one credible witness, or an admissible document, is sufficient in law to establish any fact; but, as a matter of practice, a Court would be slow to convict of a serious crime on the unsupported testimony of one witness. The principal exceptions to the rule that one witness is sufficient are: (1) In charges of treason or treason felony, no one can be convicted, unless two witnesses swear to the treason, or he confesses in open Court; this is provided by Statute;\* (2) no one can be convicted of perjury on the evidence of one witness unless the witness is corroborated in some material point; otherwise it is simply a case of one man's oath against the other, and each would be equally credible;† and (3) offences under the Criminal Law Amendment

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\* 7 and 8 Will. III, c. 3, s. 2; 36 Geo. III, c. 7, s. 1.

† Perjury Act, 1911, s. 13.



Act, 1885. **Man., VI, 44, 45 ; Powell, pp. 446-447.** Unless a Statute has provided as to the nature of the evidence necessary, the corroboration required is independent testimony which confirms in some material particular not only the evidence that the offence has been committed, but also that the accused committed it.

(ix.) CIRCUMSTANTIAL EVIDENCE.

It is usual to distinguish between two kinds of evidence, viz., *Direct* and *Circumstantial* (or *Indirect*). Direct evidence is that which goes straight to establish the *factum probandum*, or fact in issue. Circumstantial evidence (sometimes called indirect or inferential evidence) is that which establishes certain minor facts (*facta probantia*), the effect of which is to establish the fact in issue. **Powell, p. 7.** By the former we mean the evidence of a person who actually saw, or otherwise observed with his senses, the fact to which he testifies. Indirect or circumstantial evidence is evidence of facts from which the main fact of the accused's guilt or innocence may be presumed. In comparing them, it must be remembered that the difference is not one of *degree* (as in the case of primary and secondary evidence), but of *kind*. Circumstantial evidence is not inferior to direct evidence, and may be superior to it ; for "facts cannot lie," while witnesses may (and do). But, on the other hand, it must be remembered that the inference suggested by facts is not always the true one ; and, therefore, before a Court convicts on circumstantial evidence only, they should be satisfied that the facts proved are not only consistent with the accused's guilt, but are inconsistent with his innocence.

**Man., VI, 41, 42 ; Harris, p. 401.**

(x.) OPINION.

The general rule is that a witness must only state facts, and that his mere personal opinion is not evidence. The following are the principal exceptions to this rule :—

- (a) On questions of identification a witness is allowed to speak as to his opinion or belief.
- (b) A witness's opinion is admissible to prove the age of a person, or the apparent condition or state of a person or thing, or the value of a thing.
- (c) The opinions of skilled or scientific witnesses (called usually experts) are admissible to elucidate strictly professional or scientific matters.

**Man., VI, 63-67 ; Powell, pp. 37-49, 51 ;  
Phipson, pp. 121-124.**

### *Illustrations.*

1. A witness may give his opinion as to whether a certain document is in the handwriting of a person with whose writing he is well acquainted.
2. A witness may state that a person appeared rich or poor, or young or old.
3. A medical man may give his opinion as to the action of a poison and the usual symptoms produced by it.
4. In a case of alleged unsoundness of mind, a medical man may give his opinion as to whether the symptoms exhibited by the alleged lunatic usually show unsoundness of mind.
5. An Officer may give an opinion on any technical point connected with military science which the members of the Court would not be expected to know, *e.g.*, an Engineer Officer, on a point of fortification, or an Artillery Officer, on a detail of artillery science ; but on points within ordinary military professional knowledge, the Court must take judicial notice of the matter and form their own opinion.

Experts are only considered such when the subject with which they deal is one which requires a course of special study or experience. It is for the Court to decide whether the skill of the witness, in any matter on which evidence of his opinion is offered, is sufficient to entitle him to be considered an expert.

**Stephen, Art. 49.**

The evidence of experts must be received with caution, because they are apt to make themselves partisans, and their minds are biassed in favour of the cause they are called to support. **Powell, p. 434.**

Experts are often called to prove handwriting ; but so long as a witness shows he is skilled in the comparison of handwritings, he need not be a professional expert.

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The witness may be called on to prove his skill by comparing writings before the Court. The genuineness or otherwise of handwriting in dispute may be proved in various ways :—

- (a) By calling the party who actually wrote it.
- (b) By a witness who actually saw the party write.
- (c) By a witness who is acquainted with the handwriting of the supposed writer, from the fact that he had seen him write at any time, even though only once, or that he has received documents, purporting to be written by that person, in answer to others addressed by the witness to him.
- (d) By a witness, skilled in comparing handwritings, giving his opinion, by comparing the writing with any writing proved to the satisfaction of the Court to be the genuine writing of the party.

**Man., VI, 67 ; Powell, p. 45 ;  
Stephen, Arts. 51, 52.**

It has been decided that a witness who swears falsely that he *thinks* or *believes*, is equally guilty of perjury with one who swears positively to what he knows is untrue.

**Man., VI, 68.**

#### (xi.) ADMISSIONS AND CONFESSIONS.

An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant thereto, made by, or on behalf of, any party to the proceeding. Such admissions are, as a rule, only relevant as against the party making them, and not in his favour. In criminal proceedings, admissions, as distinguished from confessions, are, strictly speaking, not admissible ; this does not extend to things said or done by the accused, as part of the *res gestæ*, *e.g.*, an entry made by a person in an account book of the receipt of money is, on proof that he made the entry, received as an admission, on his part, of the receipt of the same.

**Man., VI, 72, and note ; Stephen, Art. 15.**

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime.

**Stephen, Art. 21.**

A confession can only be used against the party making it ; except a confession by an accomplice, made in the presence of another, is admissible so far as to show the conduct of the latter on hearing the confession made. A confession is only admissible if it is proved affirmatively to have been made entirely voluntarily. It is not deemed to be voluntary if it was caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused ; and if it gave the accused reasonable grounds for supposing that, by making the confession, he would gain some advantage or escape some evil in connexion with the charge against him.

The Prosecutor, Officers of Justice having the accused in custody, Magistrates, and other persons in similar positions, are persons in authority. The master of an accused is not, unless the crime was against him.

A confession is not involuntary because the accused was caused, by the exhortations of a person in authority, to make it as a *religious* duty, or by any inducement collateral to the proceedings, or held out by a person not in authority. It is deemed to be voluntary if made after the complete removal of the impression produced by any threat or promise, or other inducement, which would have rendered it involuntary.

**Man., VI, 73-77 ; Stephen, Arts. 21, 22.**

Evidence amounting to confession may be used as such against the person who gave it ; and similarly statements made by an accused to his Commanding Officer investigating the charge may be used as a confession.

**Man., VI, 81.**

No confession or statement, or the answer to any question made or given at a Court of Inquiry, is

admissible against any Officer or soldier, except when he is tried under s. 29 of the Army Act.

**R.P., 124 (L).**

Facts discovered in consequence of confessions improperly obtained may be proved, even though the confession itself is inadmissible. If a confession is used, the whole of it must be given in evidence, and not only the part adverse to the accused.

**Man., VI, 78, 80 ; Stephen, Art. 22.**

### *Illustrations.*

1. A handbill, issued by the Secretary of State, promising a pardon to any accomplice who would confess as to a murder, induces the accused to make a confession. This is not voluntary.

2. The Chaplain exhorts an accused to confess his sins, and the latter makes a confession. This is voluntary.

3. The Serjeant of the Guard promises a soldier in arrest to let him have some tobacco if he will acknowledge his offence. The latter does so. This is a voluntary confession.

4. The Officer Commanding the accused's Company promises to try to get the Commanding Officer to pardon his offence if he will make a confession. The Commanding Officer refuses, and, after this has been reported to the man, he makes a confession. This is voluntary.

5. A soldier, accused of theft, makes a confession under circumstances which prevents it from being received as voluntary. Part of it is to the effect that the stolen property is concealed in a certain place. Evidence may be given to prove that he said this, and that the property was found at the place indicated.

### (xii.) COMPETENCY OF WITNESSES.

As a rule, all persons are competent witnesses ; the only exceptions being in the case of one prevented, in the opinion of the Court, by extreme youth, or disease affecting his mind, from understanding the facts he is to testify to, or from realizing the necessity of speaking the truth. A lunatic, *i.e.*, one who has lost his reason, may give evidence during lucid intervals. A drunken person is incompetent while under the influence of drink, but may be examined when sober. There is no legal age which fixes the competency of a child. The Court must decide in each case by the intelligence of the proposed witness, and, by examining him or her, to see if he or she understand the obligations of an oath. Former rules excluding witnesses on the ground of want of religious belief, or general bad character, or because they are parties to the case, are no longer the law ;

but, as already pointed out, it must be distinctly remembered that it by no means follows that all evidence that is *admissible* is, therefore, *credible*, and, in weighing the evidence, the Court must carefully consider any facts likely to diminish the credibility of the witnesses who gave it. **Man., VI, 82, 87-91 ; Powell, pp. 170-172, 185 ; Stephen, Arts. 106, 107.**

The credibility of a witness depends on (1) his knowledge of the facts he testifies ; (2) his disinterestedness ; (3) his veracity ; and (4) his being bound to speak the truth by such oath as he deems obligatory or such affirmation as the law allows to be substituted. The Court will decide the degree of credit his evidence deserves accordingly. **Denman, p. 159.** One ground for relying on testimony is its *probability*, *i.e.*, its accordance with facts previously known. It has been observed by a Judge that "there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life." **Powell, pp. 4, 5.**

A member of a Court-Martial is incompetent to give evidence for the prosecution, but is a competent witness for the defence ; though, of course, if it is known that an accused intends to call any Officer in his defence, such Officer should not be detailed to serve on the Court. **Man., VI, 90.**

One radical change in the law of evidence was made by the Criminal Evidence Act, 1898. Before this Act, except in a few cases specially provided for in various Statutes, the accused, and the husband or wife of the accused, were incompetent to give evidence either for the prosecution or defence, and this rule extended to the case of accused jointly tried.

Under the present law, an accused can, if he wishes, give evidence in his defence at every stage of the

proceedings, but he cannot be *compelled* to give evidence, and no comment may be made by the prosecution upon the fact of his having refused to do so. **Man., VI, 83 ; Stephen, Art. 108.** A like rule now applies to the husband or wife of an accused. But although by the Act of 1898, referred to above, the wife (or husband) is now *competent* to give evidence for the accused, she (or he) is not *compellable* to do so, unless willing, except in certain cases provided by Statute. A wife can still be called as witness for the prosecution in the special cases provided for by Statute, as above mentioned, *e.g.*, in cases of personal violence against her, or in cases of offences against women and girls under the Criminal Law Amendment Act, 1885, or in cases of bigamy, under the Criminal Justice Administration Act, 1914. **Man., VI, 86 ; Cockle, p. 247 et seq.** In the case of accused jointly tried, they may be witnesses for the defence, but only if the accused chooses to call them.

If the evidence of one accused is wanted against another who is being jointly tried with him, he should be released, and he is then said to turn King's evidence. But the evidence of an accomplice is considered "tainted," and should always be received with caution, and a Court should not convict on the unsupported evidence of an accomplice. **Man., VI, 84, 85.** This is not a rule of law, but it is the present practice to require corroboration. Corroboration of the evidence of one accomplice by that of another is insufficient unless there is corroboration by an untainted witness.

**Denman, p. 6.**

The wife of the Prosecutor is competent to give evidence for the prosecution or defence.

**Man., VI, 86.**

#### (xiii.) PRIVILEGES OF WITNESSES.

Although a witness may be *competent* to give evidence, it does not follow that he can be *compelled* to do so. For example, an accused is, by the change in the

law just noted, competent to give evidence in his defence, but he cannot be compelled to do so against his will, neither can his wife be called as a witness unless he requests that she may be so called in his defence. In the case of witnesses other than the accused, there are many questions which they are not compelled to answer, and some which they will not be permitted to answer. When a witness is not compellable to answer a question or to produce some particular document, it is because some privilege intervenes, which may either be the privilege of the witness himself or of some third party.

**Man., VI, 92 ; Powell, pp. 191, 192.**

In the first place, no witness (except the accused when giving evidence in his defence) can be compelled to answer any question or produce any document tending to incriminate himself or the wife or husband of the witness, *i.e.*, to show that he had done anything which would expose him to a criminal charge, or to a penalty or forfeiture of any kind. This privilege does not extend to answers tending to expose him to civil liability, *e.g.*, an action for debt. The witness himself is not the sole judge whether the answer will bring him into danger ; the Court must be satisfied whether there is reasonable ground to apprehend danger to him, if compelled to answer. The privilege of refusing to answer is that of the witness alone, and neither party can take advantage of it. The witness may, if he likes, waive his privilege and answer at his peril.

**Man., VI, 93, 94, 95 ; Powell, p. 192 ;  
Stephen, Art. 120 ; Denman, p. 320.**

When the accused is giving evidence on his own behalf, he may be asked a question that would tend to incriminate him as to the offence charged ; but he cannot be compelled to answer any question tending to show that he has committed any other offence unless (1) the proof that he has committed this other offence is admissible to show that he is guilty of the offence now charged ; or (2) he has asked questions of the



witnesses for the prosecution to prove his own good character or given evidence to this effect, or if the conduct of the defence has been such as to make imputations on the character of the Prosecutor or his witnesses ; or (3) he has given evidence against any other person charged with the same offence. He may not be asked questions tending to incriminate his wife.

**R.P., 80 ; Man., VI, 93A.**

A witness cannot be compelled to answer any question relating to State affairs without the permission of the Head of the Department concerned. Similarly, a witness cannot be compelled to answer any question, the answer to which would tend to disclose the names of persons by or to whom information was given as to the commission of offences.

**Man., VI, 96-99 ; Powell, p. 209 ;  
Stephen, Arts. 112, 113.**

No question may be put to a witness as to the votes of the members of any Court-Martial previously held.

**A.O. 81.**

Neither a husband nor wife is compellable to disclose any communication made to him or her by the other party during marriage, and this privilege continues for the benefit of the survivor even after the death of one of the parties.

**Man., VI, 100 ; Powell, p. 200 ;  
Stephen, Art. 110.**

A legal adviser is not competent, without his client's express consent, to disclose any communication made to him as such legal adviser by, or on behalf of, his client, whether such communication was oral or documentary, and whether or not the relationship has terminated. This privilege does not extend to any communication made in furtherance of a criminal purpose, or any fact he may have observed, during the course of his employment, showing a crime or fraud has been committed since the commencement of his employment, or any fact he has become aware of otherwise than in his professional capacity. The expression,

"legal adviser," includes barristers, solicitors, their clerks, and interpreters between them and their clients. It will include an Officer or other person who has acted as accused's friend at a Court-Martial. The privilege is the client's, and if he choose to waive it the witness must answer. **Man., VI, 101 ; Powell, pp. 201-207 ; Stephen, Arts. 115, 116.**

No other relationship except this legal one gives any such privilege, and clergymen and medical advisers may be compelled to disclose communications made to them in professional confidence, but it is not the custom to press for such disclosures in the case of clergymen, and several Judges have expressed themselves strongly against such a course.

**Man., VI, 102 ; Powell, pp. 208, 209 ; Stephen, Art. 117 and note xliv.**

### *Illustrations.*

1. A., a civilian witness against Private B., who is charged with stealing public property, is asked whether he bought any of these stores from the accused ; A. can refuse to answer, as the reply might render him liable to a prosecution under section 156 of the Army Act.

2. Serjeant C., a witness, is asked by the accused, " Were you not convicted of embezzlement by a District Court-Martial in 1821 ? " The witness must answer this question.

3. Colonel D., a witness, is asked on behalf of the accused, Lieutenant E., a question as to the Confidential Report he had sent in about the latter. This question cannot be answered without the permission of the Secretary of State for War.

4. Private F., a witness for the prosecution, is asked, in cross-examination, if he was not, four years ago, " Private G." of another Regiment. If the answer would expose him to a trial for fraudulent enlistment, he can refuse to answer.

5. A Warrant Officer is being tried for having given false evidence at a Court-Martial for the trial of Lieutenant H., an Officer of the Regiment ; Captain I., who acted as accused's friend at the former trial, is called as witness by the accused and asked to produce a note written to him by H. relating to the conduct of his defence. The witness cannot produce the document without Lieutenant H.'s consent.

### (xiv.) EXAMINATION OF WITNESSES.

Every witness (including one producing documents) before giving his evidence, must be sworn in the manner prescribed by the Rules of Procedure, unless he is of a class permitted to affirm. **s. 52 (3) ; R.P., 30, 82 ; Man., p. 705.** The one exception to this rule is made by the Criminal Justice Administration Act, 1914, in

the case where a child of tender years, who does not understand the nature of an oath, is offered as a witness, when the Court may allow the child to give evidence without being sworn, if satisfied that the child is of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Such unsworn evidence must, however, be corroborated. **4 & 5 Geo. V, c. 58, s. 28 (2).**

The witness may then be submitted (1) to examination-in-chief by the party calling him, (2) to cross-examination by the opposite party, and (3) to re-examination by the party calling him. He is also liable to be examined by the Court and the Judge-Advocate, if there be one. **R.P., 84, 85.**

In the examination-in-chief, the questions asked must be relevant to the matter in issue and a witness must not, as a rule, be asked a leading question, *i.e.*, one which suggests the answer required. The exceptions to this rule are, when the questions relate only to introductory matter, and not to the substance of the issue; or when the witness is very young, or is clearly somewhat deficient in understanding, and requires help to get his evidence out of him properly; or, lastly, in the case of a hostile witness. In these last cases, leading questions may, by the leave of the Court, be put. The reason for excluding such questions is to prevent either party putting into the mouth of the witness the story he wishes him to tell. Of course, in the case of a hostile witness, the reason for the rule disappears, a hostile witness being one who has been called by either party, but who, by his manner, shows he is distinctly reluctant to give his evidence. Such a one may be treated exactly as though he had been called by the opposite side, with the one exception that the party calling him must not impeach his credit by general evidence of bad character; he has called him and produced him to the Court, and he cannot now seek to show that he is unworthy of belief. He may, however, contradict him by other evidence, or prove that he has

previously made a statement at variance with his present testimony.

**Man., VI, 106-111 ;**

**Stephen, Arts. 128-132 ; Powell, p. 459.**

When the examination-in-chief is concluded, the opposite party has the right to cross-examine. The object of the cross-examination is to impeach the accuracy, credibility, and general value of the evidence given by the witness, and to elicit facts favourable to the cross-examining party. Leading questions may be asked, but it is not allowable to put into the witness's mouth the very words he is to echo back again ; and irrelevant questions may be put, in order to throw the witness off his guard. The witness may be asked any questions which shake his credit by injuring his character, but he can decline to answer if he is entitled to claim privilege as explained in the last section. Evidence cannot be given to contradict his answers to questions which may shake his credit by injuring his character, except when (1) he is asked if he has ever been convicted of felony or misdemeanour, and he denies or refuses to answer ; (2) he is asked a question to show he is not impartial ; (3) he has previously made an inconsistent statement ; or (4) he can be shown to be a notorious liar. If the imputation conveyed by any question would only injure the character of the witness, but would not, in the opinion of the Court, shake his credit, they will not compel him to answer it ; and no further examination on this matter will be allowed. The credit of a witness may be impeached by the evidence of other witnesses who swear that they believe him to be unworthy of belief on his oath ; they may not be asked their reasons for this belief in their examination-in-chief, but in cross-examination they can be asked such reasons. When the credit of a witness has been thus impeached, the party calling him may call other witnesses to re-establish his credit.

**R.P., 92 (B) ; Man., VI, 112-117 ; Powell, pp. 463**

***et seq.* ; Stephen, Arts. 129-133 ; Denman, p. 164.**

After the cross-examination, the witness may be

re-examined by the party calling him for the purpose of reconciling any discrepancies that may have arisen between the evidence given in the examination-in-chief and the cross-examination, or to remove any suspicion which the cross-examination may have thrown on the evidence. Such re-examination must be confined to matters arising out of the cross-examination, and cannot be used to repair omissions in the examination-in-chief. If new matter is, by the leave of the Court, introduced, then the opposite party can cross-examine further on such new matter.

**Man., VI, 118 ; Powell, p. 469 ;  
Stephen, Art. 127.**

All questions will be put to the witnesses directly by the party asking them, without the intervention of the Court. The evidence will be taken down in a narrative form, as nearly as possible in the words used, unless the Prosecutor, accused, Judge-Advocate, or the Court consider any question and answer material, when they will be recorded *verbatim*. Similarly, any question objected to, with the grounds of objection, and the decision of the Court, will be recorded if any of the above-named consider it necessary. At the conclusion of his evidence, the evidence as taken down will be read over to the witness, to give him an opportunity of correcting any mistakes, either in the evidence he gave, or in the way it has been taken down. At a General Court-Martial where there is a shorthand writer this rule need not be complied with if in the opinion of the Court and the Judge-Advocate (such opinion being recorded in the Proceedings) it is inexpedient to do so unless any witness requires it. **R.P., 83, 95 (B), (C).**

A witness may not read his evidence, but he may refresh his memory by referring to any notes, provided such notes were made by him, or with his knowledge of their correctness, soon after the occurrence to which they relate, and while the facts were fresh in his memory. These notes must, if the opposite party

wish, be handed over to him for inspection, and he can cross-examine the witness on them.

**Powell, pp. 151-153 ; Stephen, Arts. 136, 137.**

### *Illustrations.*

1. Private A. is charged with desertion. Serjeant B., a witness for the prosecution, is asked by the Prosecutor, "Was the accused about to enter the train to Southampton, dressed in plain clothes, when you arrested him?" This is a leading question, and can be objected to.

2. Private C. is charged with stealing a watch from a shop in the town. Private D., a witness for the prosecution, is asked by the Prosecutor, "Were you looking in at Mr. E.'s shop window about 4 p.m. on the 11th November?" This is only introductory, and therefore, though a leading question, may be put.

3. The same witness is afterwards asked, "Did you see the accused take up a watch off the counter?" This is a leading question on a material point, and cannot be put. The question should be, "Did you see the accused do anything?"

4. Private F. is charged with absence and deficiency of kit. Serjeant G. and Lance-Corporal H. may both use the list of deficiencies which they made and signed when they took an inventory of his kit on his being reported absent, to refresh their memories as to the articles deficient.

### (xv.) WEIGHT OF EVIDENCE.

The weight of evidence cannot be determined by legal rules, since it depends on common sense and experience. Where the scales are evenly balanced, the benefit of the doubt must be given to the accused as the Prosecution has not proved the charge beyond all reasonable doubt.

**Shipson, p. 202.**

As regards the reliance to be placed on the statements of the witnesses the Court should consider (a) their age, (b) intelligence, (c) opportunities for observation, (d) memory, (e) interest or bias, (f) manner in Court, etc. **Cockle, p. 139.** More weight should be given in matters of observation to the evidence of an educated, than an uneducated, man ; and the evidence of a witness who swears positively that a certain event occurred is of more value than that of one who says it did not, as the latter may not have had his attention drawn to the fact at the time. Reliance on any evidence is increased by corroboration. In spite of the maxim *testimonia ponderanda sunt non numeranda*, the evidence of two witnesses corroborating each other carries more weight than that of one. Another ground for reliance on

human testimony is its probability ; *i.e.*, its accordance with the ordinary course of human affairs and the usual habits of life.

**Powell, p. 421.**

(xvi.) PRESUMPTIONS.

Presumptions are either of law or of fact, and when of law may be either conclusive or rebuttable. They are :—

- (i.) *Praesumptiones juris et de jure*, which are conclusive ; *e.g.*, that an infant under seven years of age is incapable of felony, or that every one knows the law, *i.e.*, that ignorance of law is no excuse for crime.
- (ii.) *Praesumptiones juris*, which are rebuttable ; *e.g.*, that every one is innocent till legally proved guilty of an offence ; or that a child between seven and fourteen is incapable of felony which may be rebutted by evidence ; or that a person is sane until proved insane ; or that a sane person intends the probable consequences of his acts ; or that all documents were made on the day they are dated.
- (iii.) *Praesumptiones hominis* or of fact, which are always rebuttable, *e.g.*, inferences which the mind naturally and logically draws from given facts.

**Phipson, pp. 4, 203-205.**

## CHAPTER XV

### COURTS OF INQUIRY AND BOARDS

A COURT of Inquiry may be assembled by the Army Council or any Commanding Officer, whether of one or more Corps. Such Court has no judicial power, but will merely collect evidence and report. The Court will give no opinion on any point involving the conduct of any Officer or soldier, unless so directed by the Convening Officer. The Court cannot compel the attendance of civilian witnesses, and, except in the case of illegal absence or on recovered prisoners of war, the evidence will only be taken on oath if the Convening Officer so directs. Such Court may consist of any number of members from two upwards, and of any rank or of any branch of the Service, but three will usually be enough, the senior either being appointed President by name, or acting as such by virtue of his seniority. It has been ruled that one Officer is not sufficient.

**ss. 70 (5), 72 (1) ; R.P., 124 ; K.R., 728, 729 ;  
Thomson, p. 112.**

Whenever the inquiry affects the character of any Officer or soldier, he must be given an opportunity of being present throughout and of making any defence he thinks fit ; but he has no right to claim the attendance of Counsel to assist him, and it is unusual to permit the presence of any professional adviser.

**R.P., 124 (F) ; Simmons, p. 140 ; Thomson, p. 111.**

A Court of Inquiry is not an open Court, and the public may be excluded. The Proceedings are signed by each member. This is the ordinary practice and was at one time so ordered by Queen's Regulations.

**Simmons, p. 140.**



The law as to the Court of Inquiry assembled to inquire into the illegal absence of a soldier has already been explained on pp. 42 *et seq.*

Whenever an Officer or soldier is injured, either on or off duty (except by wounds in action) the Medical Officer will forward a certificate (on A.F. B 117) as to the extent of the injury to the Commanding Officer as soon as possible. If he certifies that the injury is slight and unlikely to cause permanent ill effects, no Court of Inquiry need be held ; unless considered necessary. A.F. B 117 will in the case of an Officer be sent to the War Office, and in the case of a soldier to the Officer in charge of Records to be kept with the man's original Attestation, a note being made in his Medical History Sheet whether he was on duty or to blame. If, however, the injury is fatal (unless an inquest has been held), or is serious, or doubt exists as to the cause, or whether the soldier was on duty or not, or in any other case where the Commanding Officer thinks necessary, a Court of Inquiry is to be assembled to investigate the circumstances. The Court gives no opinion ; but the Commanding Officer records his opinion on the evidence. The proceedings are then confirmed by the Brigade Commander, who notes any remission of hospital stoppages he may make. It will be noted in the man's Medical History Sheet that the Court has been held, and whether he was on duty, or to blame, or not ; and the Medical Officer will record his opinion as to the effect of the injury on the man's service. The Proceedings are attached to the man's original Attestation Paper. **K.R., 735.**

Whenever an Officer or soldier, not on duty, is injured through the fault of a civilian, and receives compensation from the civilian, in lieu of any further claim, this fact will be recorded in A.F. B 117 or in the Proceedings of the Court, if held.

Whenever Officers or soldiers are taken prisoners of war, a Court of Inquiry is held as soon as possible after their return, to inquire into the conduct of the senior

Officer or soldier of the party. Before commencing, each member makes a "declaration on honour." The evidence is taken on oath. The Court records an opinion as to whether the prisoners were captured by the chances of war, or through neglect or misconduct. The Proceedings are sent to the War Office.

**R.P., 124 (H), (I) ; K.R., 736.**

A Court of Inquiry is also held whenever public stores, equipment, etc., are lost, stolen, damaged, or found to be deficient, or in case of structural damage by fire or otherwise to any building, if the loss or cost of structural repairs exceeds £50.

**K.R., 732.**

Committees and Boards differ from Courts of Inquiry only in so far that the objects for which they are assembled should not involve any point of discipline, **K.R., 737**; as, for example, the Committee of Adjustment to make up the non-effective account of a deceased soldier, **R.D. Act, s. 1** ; or the Boards assembled to report on new buildings, **K.R., 1372**, or conduct the examination of Officers for promotion.

**K.R., 861, 862.**

## CHAPTER XVI

### ENLISTMENT, Etc.

A SOLDIER may enlist for twelve years, or for such shorter period as may be determined by regulation, **s. 76**, and this period may be either all army service, or partly army and partly reserve, in such proportions as may be fixed by the Army Council. **s. 77.**

Every person, on offering to enlist, must be given a Notice Paper by the recruiter, which paper contains the questions he will have to answer on attestation, the general conditions of the contract he is about to make with the Crown, and time and place where he will have to appear to be attested. **s. 80 (1).** A recruit can only be attested by a Justice of the Peace or by such Officers as the Army Council may, under the Act, authorize to attest recruits. **s. 94.** A man may be attested for the Royal Marines by a Naval Officer. **s. 179 (19A) ; A. & A.F. (Ann.) Act, 1923, s. 7.** A detailed list of such Officers is given in the Recruiting Regulations. **R.R., 61.** It is the duty of the Justice to ascertain that the recruit assents to the enlistment, and is not under the influence of liquor; he will caution him as to the penalty for making false answers, and will see that he understands the questions, and that the answers are properly recorded. **s. 80.** The man is deemed to be a soldier on signing the attestation paper and taking the oath of allegiance, and his service counts from the date of attestation. **ss. 79, 80.** Provided that in the case of a boy enlisting under the age of eighteen, the Army Council may direct that his twelve years' service is to reckon from the day he attains eighteen years of age.

**s. 76 ; A. & A.F. (Ann.) Act, 1922, s. 6 ;**

**A. & A.F. (Ann.) Act, 1923, s. 5 (1).**

Two attestations are used, each signed by the recruit, the witness, and the Magistrate or Officer attesting the recruit. For administrative purposes of reference, one is marked "original" and the other "duplicate," but each of them is legally an *original* document and is equally valid for all purposes. **R.R., 113.**

Aliens may be enlisted, provided that there are not more than two per cent. serving together in any Corps ; but an alien cannot hold any higher rank than that of Warrant Officer. **s. 95 (1).** An alien cannot plead that he is such, as a plea to the jurisdiction of a Court before which he is arraigned.

If a man has received pay for three months from enlistment or re-engagement, he cannot claim his discharge on account of any error or illegality in his enlistment or re-engagement, but if the claim is made within three months and is substantiated he will be discharged as soon as possible. **s. 100.**

An apprentice who has absconded and enlisted, concealing the fact, can be claimed by his master, if he is under twenty-one years of age, and if he was bound by a regular indenture for not less than four years, and was under sixteen when so bound ; and provided the master has within one month of his absence made the oath prescribed in the First Schedule of the Army Act before a Justice of the Peace. **s. 96 ; First Sch.**

A soldier may, under certain conditions, *extend* his service, *i.e.*, remain on with the colours instead of being transferred to the Reserve. **s. 78 (1).** The detailed regulations relating to extension of service are laid down in K.R., paras. 227, 228. On the other hand, the Army Council may allow a man to convert his colour service into reserve service, and thus be transferred to the Reserve sooner than he had agreed on enlistment. **s. 78 (1) ; K.R., 333, 362.**

A soldier may, after nine years' service, be permitted to *re-engage* to complete a total of twenty-one years' army service, under such regulations as may be made

by the Army Council. He cannot re-engage for any period less than that which will make a total of twenty-one years' service. The present regulations in force as to re-engagements are laid down in K.R., 229-233. Such soldier must sign a re-engagement paper.

**s. 84.**

Men who have completed, or are within a year of completing, twenty-one years' service, may, with the sanction of the Officer in charge of Records concerned, *continue* in the Service, subject to their right to claim their discharge at any time after giving three months' notice. A Commanding Officer may accept a shorter notice, if he thinks it in the man's interest to do so; and, on the other hand, can discharge the man at any time, but should ordinarily give him a month's notice before doing so.

**s. 85 ; K.R., 234-236.**

*Prolongation of Service* means the detention of a soldier in army service for any period, not exceeding twelve months, after the date at which he would be entitled to be transferred to the Reserve or discharged. A soldier's service may be thus prolonged when :—

- (i.) A state of war exists.
- (ii.) He is on service beyond the seas.
- (iii.) The Reserves are called out.

**s. 87 ; A. & A.F. (Ann.) Act, 1922, s. 8.**

*Transfer* is the term applied when a soldier is moved from the Corps in which he is serving to another Corps, or to the Reserve. *Posting* is the term applied to the movement of a man from one part of his Corps to another part, as from one Battalion to another, or to the Depot, or the Permanent Staff of a Battalion of the Territorial Army; this can be done without the man's consent. **s. 82 (2), note.** A soldier can be transferred at any time with his own consent. He can only be transferred to another Corps without his consent under the following circumstances :—

- (1) When enlisted for general service, he may, within three months of his attestation, or at

any time while the Army Reserve is called out on permanent service, be transferred to any other Corps of the same arm of the Service.

- (2) When he has been invalided from abroad, or when his Corps is ordered abroad and he is, on account of ill-health, unfit to go with it, or is within two years of the termination of his service.
- (3) When he is serving abroad and his Corps is ordered home, and he has more than two years to serve, unless he has extended his service.
- (4) When he has been convicted of desertion or fraudulent enlistment, or his trial for these offences has been dispensed with ; or when he has been sentenced by Court-Martial to not less than three months' detention, he is liable to general service in commutation, either wholly or partly, of any other punishment.
- (5) When delivered into military custody or committed as a deserter by a Court of Summary Jurisdiction.

**s. 83 ; A. (Amend.) Act, s. 1 (1).**

Men who during the late war were transferred without their consent to any other Corps can claim to be re-transferred to their former Corps.

**A. (Trans.) Act, s. 1.**

A soldier is entitled to be *discharged* on the termination of the period for which he engaged or re-engaged, except when his service has been prolonged, as explained above. If he is serving abroad at the time, he is entitled to be sent home to the United Kingdom, if he enlisted at home. This includes a recruit who purchases his discharge.

**s. 90 (1), (2).**

A recruit may *claim* his discharge on payment of £20 at any time within three months of his attestation, unless the Reserves are called out. **s. 81 ; A. & A.F. (Ann.) Act, 1920, s. 17.** Other soldiers may be *permitted* to purchase their discharge on payment of a sum varying from £35 to £100. The number permitted to do so and their selection are decided by the Army Council.  
**R.W., 999, 1001.**

The Crown at all times has the right to discharge a man whose services are no longer required ; the various classes of discharge are dealt with in K.R., para. 363.  
**s. 92 (note).**

A discharge certificate, stating the reason for his discharge, must be given to every soldier on discharge. If lost a copy will not be given.

**s. 92 (2) ; K.R., 384, 394.**

If a man has been legally discharged, the discharge cannot be cancelled even with his consent ; he can only again become subject to military law by a fresh enlistment.

## CHAPTER XVII

### BILLETING AND IMPRESSMENT OF CARRIAGES

#### (i.) BILLETING

ALL Officers and soldiers of the Regular Forces and their horses are entitled to be billeted, **s. 105** ; and those of the Auxiliary Forces are similarly entitled when they are subject to military law. **s. 181 (3)**. And when an order under s. 108 A is in force (*vide infra*), women enrolled for employment by the Army Council are entitled to be billeted in the same way as soldiers. **s. 108A (7)**.

The authority for demanding billets is the route, which is always required for the movement of troops, **s. 103** ; or, in the case of the Auxiliary Forces, an order signed by their Commanding Officer. **s. 181 (4)**. Routes are signed by the Secretary of State for War, giving general directions to move the troops as may be necessary, the particular movement being filled in as occasion requires and signed—if a general route by an Officer of the Quarter-Master-General's Department, and if a district route by the Staff Officer of the General Officer ordering it. **s. 103 (2)** ; **Man., IX, 127**. For the different kinds of routes and their uses, *vide* K.R., 1030–1037.

The actual billets are allotted by the civil police, who decide the number to be furnished by the different inn-keepers and others who are liable. **s. 103**. The distribution of the troops among the billets thus allotted is carried out by the Military Authorities, care being taken to keep the men of each section, company, etc.,



as much together as possible, and to quarter the Officers near their men, and the men with their horses.

**Second Sch. ; K.R., 1047.**

The liability to furnish billets lies on all keepers of "victualling houses," and this term includes inns, or hotels (whether licensed or not), alehouses, livery stables, places where spirits, etc., are sold by retail. Troops are, under ordinary circumstances, never to be billeted in private houses, canteens, or the residence of a Foreign Consul. **s. 104 ; A. & A.F. (Ann.) Act, s.18.** When the Territorial Army, or any part of it, has been embodied, however, the King, or in Ireland the Lord Lieutenant, may declare that a case of emergency exists, and may authorize any General or Field Officer to issue a billeting requisition, under which troops may be billeted in public buildings, dwelling houses, warehouses, barns and stables, as well as in "victualling houses." During the continuance of such an emergency order women enrolled for employment by the Army Council are entitled to be billeted in the same way as soldiers. **s. 108A ; A. (Ann.) Act, 1918, s. 4.** Every person so liable is obliged to receive such Officers and soldiers as may be billeted on him, and to furnish lodging (which includes the provision of a separate bed) and attendance for each ; and, if required, to furnish each soldier with meals as specified in the Second Schedule of the Army Act, or to allow the soldier the necessary firing and facilities for cooking his own meal, and to find stable accommodation for each horse, together with a forage ration.

**s. 106 (1) ; Second Sch.**

The prices to be paid for billets are fixed annually in a Schedule attached to the Army Annual Act, except under a requisition of emergency, when they are fixed by the Army Council with the consent of the Treasury, **ss. 106 (3), 108A (3) ; A. Ann. Act, Sch. ;** and the senior Officer or Non-Commissioned Officer of every party billeted must, before departure, or if the party remains longer than four days, then every fourth day,

pay what is due to the person furnishing the billets, **s. 106 (4)** ; to refuse or omit to do this is an offence against military law. **s. 30 (3).**

No one holding any military office or commission can act as a justice or constable in billeting any person or horse belonging to the corps under his command.

**s. 120 (2).**

The offences which persons subject to military law can commit in connexion with billets are dealt with in ss. 30 and 111. They can be tried by Court-Martial or by a Court of Summary Jurisdiction, and in the latter case are liable to a fine not exceeding £50.

**s. 111 (2).**

A Constable who wrongfully billets persons not entitled, or accepts a bribe in connexion with billeting, or refuses to billet anyone entitled, is liable to a fine of not less than 40s., or more than £10. **s. 109.** An innkeeper who refuses to receive anyone lawfully billeted on him, or attempts to offer any bribe to escape his liability, is liable to a fine of not less than 40s., or more than £5. **s. 110.**

## (ii.) IMPRESSMENT OF CARRIAGES.

Upon production of a route, or, in the case of the Auxiliary Forces, when subject to military law, an order signed by their Commanding Officer, every Justice of the Peace is bound to issue his warrant for the impressment of such carriages, with the horses (or other animals), and drivers, as may be necessary for the movement of the regimental baggage and stores of the troops named in the route or order. **ss. 112, 181 (3), (4).** The amount to be paid to the owners is fixed in the Third Schedule attached to the Act, which amount may, under certain circumstances, be increased by the proper authority, if the local price of forage renders such an increase just. A carriage is not, except in emergency, to be required to travel more than one day's journey, or twenty-five miles.

**s. 113, Third Sch.**

The King, or in Ireland the Lord Lieutenant, may declare that a condition of emergency exists, and may authorize any General, or Field Officer Commanding a District, to issue a requisition on a Justice of the Peace, for carriages and horses of every description, and also for all kinds of boats on any river or canal, and food, forage, or stores of every description. It should be noted that there is no authority to impress drivers under this section. If necessary, they would have to be impressed under the Proclamation issued by the King's prerogative at the beginning of a war. If an order calling out the Reserve is in force at the time, the requisition of emergency may extend to the purchase, as well as the hire, of the foregoing transport or food and other stores. If the person ordered to provide any of the things named in the requisition refuses or neglects to do so, the Officer may seize them, if necessary by force. **s. 115.** If any difference arises as to the amount to be paid, it will be fixed by the County Court Judge. **A. (Amend.) Act, s. 2.**

Similar provisions are made for offences in regard to impressment of carriages, whether committed by persons subject to military law, constables, or others, as in the case of billets. **ss. 31, 116, 117, 118.**

## CHAPTER XVIII

### MISCELLANEOUS

#### (i.) EXEMPTIONS OF OFFICERS AND SOLDIERS.

ALL Officers and soldiers of the Regular Forces (which term includes Marines, Indian Forces, and Auxiliary Forces when subject to military law) on duty are exempt from payment of any tolls or duties fixed by Act of Parliament, when embarking or disembarking at any landing place, or when passing over any turn-pike road or bridge. A like exemption extends to their horses and baggage, all soldiers under military escort, and all carriages belonging to the Crown or employed in military service in conveying any of the above-named persons or baggage, or on returning from conveying the same. This exemption does not extend to boats or barges. It is not a personal one, and only applies when Officers or soldiers are on duty, and it has been decided that an Officer living out of barracks for his own convenience is liable to pay toll when passing between the barracks and his residence.

**s. 143.** This section does not exempt troops from paying fees charged by owners for permission to pass over their private property. It can be seen, by referring to the notice board at the gate, whether a toll is authorized by Parliament. **K.R., 1050.**

No soldier can, by any process of law, be taken out of the Service, or compelled to appear personally (otherwise than as a witness) in any case, except :—

- (a) On a charge of, or conviction for, crime ;
- (b) On account of a debt exceeding £30 over and above the costs of the action.

A crime means a felony or misdemeanour, and does not include breach of contract. This exemption is, of

course, only personal, and does not prevent a soldier being sued for money owed by him. **s. 144.** This exemption does not extend to an Officer, who remains liable in the same way as a civilian.

An Officer or soldier cannot charge or assign his pay (including half pay) or pension for the payment of any debt. The Courts have held that until paid over an Officer's pay or retired pay cannot be taken in execution (*e.g.*, to satisfy an order for maintenance of wife); *secus* when once paid over. Under the Bankruptcy Act, 1883, the approval of the Army Council must be obtained before any pay of an Officer can be set aside, and it has been ruled that the pay of an Officer on the active list should not be so appropriated. If an Officer becomes a bankrupt, the Army Council will decide whether he may retain his commission.

**s. 141 and note 3 ; K.R., 501 ;**

**Clode, Vol. II, pp. 105-107.**

The Court of Appeal has recently decided that a Commanding Officer is not liable for the debts of the Officers' Mess. His control over the Mess Committee is of a disciplinary nature only, and does not make the Committee his agents in dealing with tradesmen. The King's Regulations regulate the relations of Officers *inter se*, and have nothing to do with the relations between Officers and tradesmen.

Officers on full pay are, by the Juries Act, 1870, exempt from serving on juries in the United Kingdom, **33 & 34 Vict., c. 77, s. 9** ; and soldiers are, by the Army Act, similarly exempt anywhere. **s. 147.** Officers and men of the Territorial Army are also exempt at all times from serving on any jury. **T. & R.F. Acts, s. 23 (4).** This exemption must, however, in England and Wales, be claimed when the jury lists are made out annually in September, or they will be bound to serve if summoned. **33 & 34 Vict., c. 77, s. 12 ;**

**Man., XII, 8, note.**

Officers of the Army and Officers and men of the Territorial Army are further exempt from serving in

any municipal office, and indeed are expressly disqualified by the Army Act from holding certain civil and municipal offices.

**s. 146 ; T. & R.F. Act, s. 23 (4) ; Man., XII, 8.**

Officers are moreover exempt from paying licence duty for their soldier servants, or servants employed by them under Army Regulations. **Man., XII, 5.**

Officers and men dying on active service can, as regards their personal property, dispose of it by what is called a *nuncupative* will : *i.e.*, it need not be made in writing or executed with the usual formalities. It was held by the Probate Division of the High Court, during the late war, that this includes an Officer or soldier from the time he receives orders to proceed on active service. Probate of the wills of soldiers, dying in the Service, are exempt from probate duty. If the surplus of the personal effects of an Officer or soldier, after paying the preferential charges, is less than £100, no duty is payable thereon.

**R.D. Act, s. 16 ; Man., XII, 4 ; Clode, Vol. I, p. 212.**

## (ii.) LIABILITY TO MAINTAIN WIFE AND CHILDREN.

A soldier is, like any other citizen, liable to maintain his wife and children, and also any illegitimate children, of which he is proved the father, but execution for such maintenance cannot be levied on his military effects, neither can he be punished for deserting his wife and family, or for leaving them chargeable to the parish. If a decree is made against a soldier by any Court for the maintenance of his family, a copy is sent to the Secretary of State, or any Officer deputed by him to receive such notice.

These authorities, on receipt of the decree, or on being satisfied that the soldier has left his wife, or children under fourteen years of age, destitute, may order a daily stoppage from the man's pay, not exceeding 4s. for wife or children, whether legitimate or

illegitimate, in the case of a Warrant Officer (Class I or II) not holding an honorary commission, and not exceeding 3s. in the case of a Non-Commissioned Officer of the rank of Serjeant or upwards, and not exceeding 2s. in the case of all lower ranks. These amounts cannot be exceeded, but must be apportioned between the wife and children (if necessary) by the Army Council.

**ss. 138 (8), 145 (1), (2) ; A. & A.F. (Ann.) Act, 1921, s. 9 (1) ; A. & A.F. (Ann.) Act, 1923, s. 14 (1).**

Where an order has been made for these deductions under the former rates, a further order may be made increasing the amount up to that now allowed.

**A. & A.F. (Ann.) Act, 1921, s. 9 (2).**

Where a soldier deserts his wife and children, the cost of their poor law relief is a debt due to the Guardians, which they can recover by civil process ; but it is not a "public" debt within the meaning of the Royal Warrant, which could be recovered from his pay.

**R.W., 9, 23.**

The Courts have decided that an affiliation summons served on a soldier home on short leave from the front, when on active service, was not valid, and that he was protected by s. 145 (3) as if he were under orders for service beyond the seas.

If a man has made a false answer on attestation as to his being married, and the Parish Authorities claim him for wife desertion, and send a constable with a warrant, the Commanding Officer will discharge him and hand him over to the constable. If the Parish do not take the above steps, the soldier will either be discharged or application will be made to the War Office to retain him in the Service. If this is sanctioned, the Commanding Officer will apply to the Brigade Commander for authority to stop the man's pay, for the maintenance of his wife and family, as above stated.

**K.R., 363 (v) (a), (xiv).**

## (iii.) REDRESS OF WRONGS.

If an Officer considers himself wronged by his Commanding Officer and does not obtain the redress he is entitled to, he can complain through the proper channel to the Army Council, who must examine into his complaint and report through the Secretary of State to the King for His Majesty's direction thereon. The Officer must observe the usual channels in forwarding his complaint, and must not directly address an authority higher in the chain of military hierarchy unless the intermediate authority refuses or unreasonably delays to forward the complaint. He must then send to the Officer who has refused to forward the correspondence, a copy of his letter to the superior authority.

**s. 42 and notes ; K.R., 1634, 1646, 1854.**

An Officer of the Indian Army has a similar right of appeal to the Governor-General, and from him through the Secretary of State to His Majesty.

**s. 180 (2) (d) ; A. & A.F. (Ann.) Act, 1921, s. 4.**

It has been ruled that an Officer is entitled to treat as a wrong by his Commanding Officer, any decision which may be communicated to him by his Commanding Officer, although the latter is only acting on directions given to him by superior authority.

Similarly a soldier who thinks himself wronged by any Officer or soldier may complain to his Captain, or, if his complaint is against his Captain, to his Commanding Officer ; and if he thinks himself wronged by his Commanding Officer, either by not getting satisfactory redress, or in respect of any other matter, he can complain to the General Officer Commanding-in-Chief the Command or Station, where he is. Every Officer to whom a complaint is made must inquire into it and if he considers it just, take steps to give the soldier redress. The correct manner of making a complaint is laid down in the soldier's Army Book 64, Part I. A man can only complain for himself and not for others



(except, *e.g.*, the orderly man, who answers for the Mess when the Orderly Officer visits the rooms at meal times). A combined complaint is never permissible, and not more than two men may approach an Officer at the same time for the purpose of making a complaint. **s. 43 and notes ; R.P., 126 (E).**

An Officer or soldier may make a complaint to an Inspecting General Officer and is to be given an opportunity to do so. **K.R., 110.**

All ranks are forbidden to use any other than the prescribed methods for obtaining redress, or to make anonymous complaints, or to ventilate their grievances through the intervention of Members of Parliament, solicitors, or other third parties.

**K.R., 493 ; A.C.I. <sup>897</sup>/<sub>187</sub>.**

Although an Officer or soldier renders himself liable to be dealt with under s. 40 for making a complaint in an unauthorized manner, it has been ruled that the methods prescribed in the Army Act do not derogate from the right given by the Bill of Rights to every subject to petition the Sovereign direct.

**1 W. & M., sess. 2, c. 2, s. 5.**

If, when making a complaint, an Officer or soldier makes a false accusation against any other Officer or soldier, he is liable to be dealt with under s. 27 (1).

#### (iv.) DEFINITIONS.

“ *On Active Service* ” means whenever a person forms part of a force—

- (1) engaged in operations against the enemy ;
- (2) engaged in military operations in a country wholly or partly occupied by the enemy ; or
- (3) in military occupation of any foreign country.

Whenever, by reason of the imminence, or recent cessation, of hostilities, the Governor of a Colony, or General Officer Commanding the Forces out of the King's dominions, considers it expedient, he may de-

clare that the troops are to be deemed on active service for any period not exceeding three months ; this period can be renewed from time to time if still necessary. If the Governor or General is in telegraphic communication with the Secretary of State, he must first obtain his consent ; in other cases he must report his action as soon as possible to this Minister, who can, if he thinks fit, annul the declaration, without prejudice to anything that has taken place under it. **s. 189.**

An "*Officer*" is any person in pay, or commissioned, as such in any part of His Majesty's Forces, and includes any person, whether retired or not, who, by virtue of his commission, is entitled to the style of Officer of His Majesty's Forces, including an Officer of the Navy or Air Force while subject to military law. Warrant and other Officers holding *honorary* commissions are Officers within the meaning of the Act. **s. 190 (4) ; A. Ann. Act, 1919, s. 18.** A woman cannot be an Officer within the meaning of the Act. Any honorary rank she may hold, even if accompanied by a formal commission, is a mere matter of honour and dignity. But a woman employed on active service with troops may be subject to military law as an Officer under s. 175 (7) or (8).

The appointment of Officers is a prerogative of the Crown. **Clode, Vol. II, p. 73 ; Anson, Pt. II, p. 392.** Every Officer, for the discharge of his duties, receives a Commission under the Royal Sign Manual, countersigned by the Secretary of State for War. **Clode, Vol. II, p. 65.** In 1862 the number of commissions requiring signature having greatly increased, an Act was passed giving the Sovereign power, if occasion requires, by Order in Council to direct that commissions be issued without the Royal Sign Manual. **25 & 26 Vict., c. 4, s. 1.** Such Orders in Council have accordingly been made, when there was a large number of commissions awaiting signature. The forms of commissions for the various branches of the Service

were given in an Appendix to the Order in Council of 7th June, 1862 ; and with slight verbal alterations are those still in use. **Clode, Vol. II, pp. 440-445.** As an Officer is commissioned to "Our Land Forces," and not to any particular corps (though appointed and gazetted to a particular corps), he can, under the terms of his commission, legally be transferred to any other corps or branch of the "Land Forces," at the Sovereign's pleasure ; but in practice this is not done without his consent, unless in exceptional circumstances.

Commissions to the Native Officers of the Indian Army are granted by the Viceroy ; these commissions and those granted by him to Volunteer Officers do not convey any power of command over Officers and men of the British Regular Forces.

A "*Non-Commissioned Officer*" includes acting Non-Commissioned Officers and Army Schoolmasters, but, except as mentioned in the Act, does not include Warrant Officers. **s. 190 (5).**

A "*Soldier*" does not include an Officer ; but includes everyone else subject to military law, with certain modifications\* in the case of Warrant and Non-Commissioned Officers and persons not belonging to His Majesty's Forces.

**ss. 182, 183, 184, 190 (6).**

*Airman* has the same meaning as in the Air Force Act, where it is defined as not including an Officer, but including everyone else subject to the Act, with certain modifications.

**A.F. (Const.) Act, s. 7 ; A.F. Act, s. 190 (6).**

A "*Superior Officer*," used in relation to a soldier, includes Warrant and Non-Commissioned Officers. **s. 190 (7).** It also includes Officers and Petty Officers of the Navy, and Officers and Warrant and Non-Commissioned Officers of the Air Force, acting with or attached to Military Forces under the con-

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\* For these modifications *vide* pp. 14-16.

ditions prescribed by the Army Council and Admiralty or Air Council.\*

**s. 184A (1), (1A) ; A. (Amend.) Act ; s. 4.**

“*Regular Forces*” mean those who are liable to serve continuously for a term in every or any specified part of the world, including the Reserve Forces when called out on permanent service, the Royal Marines, and the Indian Forces. The two last with the modifications mentioned in the Act (*vide* pp. 13, 14, 16, 17).

**s. 190 (8) ; A. & A.F. (Ann.) Act, 1922, s. 9 ; R.F. Act, s. 28.**

“*Reserve Forces*” mean the Army Reserve, including the Militia.

**s. 190 (9) ; T.A. & M. Act, s. 3.**

“*Auxiliary Forces*” mean the Territorial Army and Volunteers.

**s. 190 (12) ; T.A. & M. Act, s. 3.**

A “*Corps*” means any military body, whether known as a Territorial Regiment or by any other name, as may from time to time be declared by Royal Warrant to be a Corps, and may consist entirely of regulars, or either kind of auxiliaries, or mixed. The Royal Warrant now in force was issued 12th July, 1916.

**s. 190 (15) ; A.O. <sup>250</sup>/<sub>18</sub>.**

“*Regimental*” means connected with a corps, or any battalion, or other subdivision of a corps.

**s. 190 (17).** It must therefore be noted that it does not include “garrison” or other such terms.

A “*Decoration*” means any medal, clasp, good conduct badge, or decoration.

**s. 190 (18) ; A.F. (Const.) Act, s. 7.**

A “*Military Reward*” means any reward for long service or good conduct, and includes good conduct pay, pension, and any other pecuniary reward.

**s. 190 (19).** The expression “pecuniary reward” includes a war gratuity.

“*Enemy*” includes all armed mutineers, armed rebels, armed rioters, and pirates.

**s. 190 (20).**

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\* The relative rank of Naval, Military and Air Force Officers is shown in King's Regulations. **s. 184 A (3) ; A. (Amend.) Act ; s. 4 (3) ; K.R., 878.**

- A "*Native of India*" means a person triable under Indian Military Law. **s. 190 (22).**
- A "*Colony*" means any part of His Majesty's dominions, exclusive of the British Islands and India. **s. 190 (23).**
- A "*Foreign Country*" is any place not situate in the United Kingdom, India, or a Colony, and not on the high seas. **s. 190 (24).**
- "*Beyond the Seas*" means out of the United Kingdom, the Channel Islands, and the Isle of Man. **s. 190 (25).**
- "*Prescribed*" means prescribed by the Rules of Procedure. **s. 190 (32).**
- A "*Court of Summary Jurisdiction*" means a Police or Stipendiary Magistrate, or two Justices; or, in Scotland, the Sheriff or Sheriff Substitute.
- A "*Summary Conviction*" means a conviction by any such Court. **s. 190 (35); and note.**
- "*Horse*" includes mule and every kind of beast of burden or draught. **s. 190 (40).**

In the Act, masculine words include feminine; the plural includes the singular, and the singular the plural; month means a calendar month; a year means twelve calendar months, and may commence on any day. This, however, only applies to Acts of Parliament, but not to documents. By the Rules of Procedure the term "month" in a sentence means a calendar month.

**s. 190, note 1; Interpretation Act, 1889, ss. 1, 3;  
R.P., 134 (c), (d).**

Any expression of time in any Act of Parliament or any legal instruments means Greenwich mean time unless otherwise specifically stated. **43 & 44 Vict., c. 9.** During the period that "summer time" is in force, time will be reckoned one hour in advance of Greenwich mean time. **6 & 7 Geo. V, c. 14, s. 1.**

Time for the purpose of any proceeding under the Rules of Procedure is reckoned exclusive of Sundays, Good Friday, or Christmas Day, except for reckoning time under R.P., 6, or of any punishment, or of any deduction from pay.

**R.P., 135 (A).**

(V.) COMPANY CONDUCT SHEETS.

A guard book containing sheets for every Non-Commissioned Officer under the rank of Colour-Serjeant and man in the company is to be kept by the Company Commander in his own possession. In it is to be recorded every offence committed by any man for which punishment has been awarded or reprimand administered, except offences, other than drunkenness, for which confinement to barracks for one day, or its equivalent punishment on board ship, or one extra guard or picquet has been awarded, or civil convictions which have not been entered in the Regimental Conduct Sheet. Admonition will only be entered in cases of drunkenness or those involving forfeiture of pay. Every case of drunkenness will be entered in black ink and numbered consecutively in red ink in the column set apart for that purpose. Every case of admission to hospital through alcoholism is to be entered in red ink. The Officer who makes an entry is to initial it in the last column.

**K.R., 1707.**

The following rules are to be observed in making entries :—

- (i.) In trials by Court-Martial the “statement of offence” is to be entered. When the statement of offence does not disclose the full nature of the offence the “particulars” of the charge will be given.

*E.g.* “Neglecting to obey garrison orders—bathing at a prohibited hour” ;

“Conduct to the prejudice of good order and military discipline—gambling with privates.”

- (ii.) Vague entries, such as "improper conduct," are to be avoided.
- (iii.) Confinement to barracks is entered as *C.B.* Imprisonment with hard labour as *Impt. H.L.*  
Detention as *Detn.*  
Fine as *fined* —.  
Penal Servitude as *P.S.*  
Deprived of lance stripe as *Depd. Lce. Stripe.*
- (iv.) The date of a summary award, or the original sentence of Court-Martial, is to be entered in the column "date of award."
- (v.) Forfeiture of pay (when forfeited by Royal Warrant), service pay, or a good conduct badge, is to be noted in the column of "Remarks" as "*Forfeits.....days' pay,*" or "*Forfeits G.C.B.*"

**K.R., 1702 (i.), 1703.**

All entries in the conduct sheets will be compared frequently by the Commanding Officer with the awards in the guard reports and minor offence reports.

**K.R., 1707.**

In each guard book a specimen sheet is to be kept for guidance in making entries, together with an alphabetical roll of all the sheets in the portfolio. When a sheet is temporarily taken out, the date and reason for such removal is to be noted in pencil against the man's name.

**K.R., 1707.**

If a sheet is lost, a Court of Inquiry is to be at once assembled by the Commanding Officer to investigate the circumstances, and to take evidence as to the number and nature of the entries of the lost sheet. A new sheet will then be made out in accordance with the evidence then obtained, and the Commanding Officer will authorize its being substituted for the one lost. A note in red ink, "Substituted for original, lost," with date and Commanding Officer's signature, will be made in front of "number of sheet."

**K.R., 1704.**

On promotion to colour-serjeant or higher rank, a man's Company Conduct Sheet will be destroyed, after the entries necessary for assessing his character or claim to good conduct medal have been transferred to his Regimental Sheet.

When a man is discharged, his Company Conduct Sheet will be destroyed; a record will, however, be kept on a fresh sheet of deprivation of lance stripe, severe reprimand of Non-Commissioned Officers, admission to hospital through alcoholism, and all cases of drunkenness which under former regulations did not count as regimental entries. If a man's sheet contains any entries, it will also be destroyed and a blank one substituted—

- (a) On completion of six months' service from attestation.
- (b) After every continuous period of two years without an entry.
- (c) On promotion to serjeant.
- (d) On transfer to the reserve.

When a new sheet is taken into use, the Company Commander will make and sign an entry at the top: "Sheet destroyed (date); last entry (date); number of cases of drunkenness (date of last instance)." Before destroying the old sheet the heading in the new one will be compared, and the entries in the Regimental Sheet checked.

**K.R., 1708.**

When a man dies, his Company Conduct Sheet will be forwarded to the Officer in charge of Records.

**K.R., 1712.**

When a man goes on active service his Company Sheet will be forwarded to the Officer in charge of Records, and at the conclusion of the campaign or when the man returns home will be completed from entries in the Field Conduct Book, furnished by the unit in the field, unless it should be destroyed under the terms of para. 1708, when a fresh sheet will be prepared. If the man is dead or discharged the Officer in charge of Records will destroy it.

**K.R., 1709.**



## (vi.) REGIMENTAL CONDUCT SHEETS.

A sheet for every Non-Commissioned Officer and man is to be kept with his duplicate attestation, except those of Non-Commissioned Officers of the rank of colour-serjeant and upwards, which will be kept as "confidential." The following entries will be made therein :—

- (i.) Every conviction by Court-Martial; every remission, or commutation, or suspension of a sentence is to be entered in the column of remarks, quoting the date and authority.
- (ii.) Every case of desertion or fraudulent enlistment when trial has been dispensed with, the authority and date of order to be entered.
- (iii.) Every conviction by a Court of ordinary Criminal Jurisdiction, or by a Court of Summary Jurisdiction. But when no punishment has been awarded on conviction by either of these Civil Courts, and also when the sentence of a Court of Summary Jurisdiction is a fine, and the offender has not been imprisoned in default of payment, the Commanding Officer may, if he thinks fit, apply to an Officer not below the rank of Colonel-Commandant for authority not to make a regimental entry.
- (iiia.) Every case in which a soldier has been bound over by one of these Courts to appear for conviction or judgment. But if the Commanding Officer thinks a regimental entry should not be made, he may refer the case to an Officer not below the rank of Colonel-Commandant.
- (iv.) Every severe reprimand of a Non-Commissioned Officer.

- (v.) Every case of reduction of a Non-Commissioned Officer, or deprivation of lance stripe or acting rank for an *offence* ; not for *inefficiency*.
- (vi.) Every award of detention by the Commanding Officer.
- (via.) Every award of field punishment by the Commanding Officer (on active service).
- (vib.) Every award of forfeiture of pay by the Commanding Officer (on active service).
- (vii.) Confinement to barracks exceeding seven days.
- (viii.) Every case of drunkenness.
- (ix.) Every award on board H.M. Ships declared by Order in Council to be equivalent to a regimental entry.
- (x.) Every offence entailing forfeiture of pay except (a) where the offence is absence not exceeding two days, (b) when the forfeiture is in consequence of a civil conviction, and no entry has been made under (iii.), or (c) when the offence was committed before enlistment.
- (xi.) Any punishment awarded by visitors in a military or naval prison or detention barrack ; and by the visiting committee in a civil prison.
- (xii.) Every conviction under Reserve Forces Act, 1882, s. 6, of an Army Reserve man.
- (xiii.) Every admission to hospital through alcoholism.
- (xiv.) Any special act of gallantry.

These last two entries are to be made in red ink.

**K.R., 1702.**

The rules as to the manner in which entries are to be made ; and for the disposal of the sheet in the case of the death, desertion, or discharge of the soldier ; and the action to be taken in the event of a sheet being lost, are the same as those given in the last section for the Company Sheets.

**K.R., 1703, 1704, 1712.**

When a man proceeds on active service, his Regimental Conduct Sheet will be forwarded to the Officer in charge of Records concerned, who will record therein entries contained in the Field Offence Report which will be transmitted periodically from the Adjutant-General's Office at the Base ; and at the conclusion of the campaign, or when the man returns home, it will be compared with the entries in the Field Conduct Sheet, and sent to his new Commanding Officer if the man is posted to a unit at home, or filed with his Duplicate Attestation if he is discharged or transferred to the Reserve or dies.

**K.R., 1705.**

Certified copies of all convictions by the Civil Power will be attached to the Regimental Conduct Sheet. When the imprisonment exceeds seven days, the record will be produced in evidence in the same manner as a Court-Martial conviction ; when the imprisonment is under seven days, the conviction counts as an ordinary regimental entry.

**K.R., 1702.**

A Regimental Conduct Sheet will be kept as a confidential document for any Officer convicted by Court-Martial or awarded a summary punishment by a General Officer. If the Officer goes to another unit the sheet is sent to his new Commanding Officer ; if he goes on half pay it is sent to the War Office. When an Officer has been awarded a summary punishment, a certified true copy of his Conduct Sheet will be sent to the War Office, with a statement showing how long he was in arrest. Entries are made as in the case of men. The conviction of a Warrant Officer by Court-Martial or by a Civil Court, or a summary award by a General Officer, or reduction for an offence, is entered in his Regimental Conduct Sheet.

**K.R., 1701.**

#### (vii.) FIELD CONDUCT SHEETS.

A Field Conduct Sheet is prepared in peace for all serving soldiers and reservists ; those for Warrant Officers and Non-Commissioned Officers above the rank

of Colour-Serjeant are kept by the Head Quarters of the Unit, those for all other serving soldiers by Company Commanders ; those for reservists at the place of joining. The heading is filled in as far as possible, being completed on mobilization. They are kept like Company Sheets, except that only Court-Martial convictions are entered in the case of Warrant Officers, and only regimental entries in the case of Non-Commissioned Officers of rank of Colour-Serjeant. If the soldier is transferred in the field to another unit his sheet is sent with him ; if he returns home or dies it will be sent to the Officer in charge of Records for disposal.

If necessary, Field Conduct Sheets will be prepared for Officers in the same way as a Regimental Conduct Sheet.

**K.R., 1710.**

#### (viii.) LIABILITIES OF CIVILIANS.

In addition to penalties for infringing the law relating to billeting and the impressment of carriages, which have been dealt with in Chapter XVII, civilians are liable to punishment by the ordinary Civil Courts for certain offences stated in the Army Act.

These offences and their penalties may be summarized as follows :—

- (a) Unlawfully interfering with recruiting ; *punishment*, a fine not exceeding £20. **s. 98.**
- (b) Making a false answer on attestation ; *punishment*, imprisonment not exceeding three months. **s. 99.**
- (c) Making a false oath in respect of any pension or other payment by the military authorities ; *punishment*, as for perjury, *i.e.*, seven years penal servitude. **s. 142 (1).**
- (d) Falsely pretending to be any man in the Regular, Reserve or Auxiliary Forces ; *punishment*, imprisonment not exceeding three months, or a fine not exceeding £25.

**s. 142 (2), (3).**

- (e) Pretending to be a deserter ; *punishment*, imprisonment not exceeding three months.

**s. 152.**

- (f) Persuading or assisting an Officer or soldier to desert or absent himself without leave ; *punishment*, imprisonment not exceeding six months.

**s. 153 ; A. (Ann.) Act, 1919, s. 11.**

- (g) Obstructing or interfering with an Officer or soldier in the execution of his duties, or wilfully producing any disease in or injuring any man known to be a soldier to enable him to avoid service, or supplying a soldier with any drug for such purpose ; *punishment*, imprisonment not exceeding six months, or a fine not exceeding £100, or both.

**s. 153A ; A. & A.F. (Ann.) Act, s. 23.**

- (h) Trafficking in commissions ; *punishment*, a fine of £100, or imprisonment not exceeding six months.

**s. 155.**

- (i) Buying, exchanging, pawning, etc., any military equipment, Officer's or soldier's kit, etc., or enticing or helping any person to so deal with such things, unless the accused proves the things were sold by order of competent military authority or belonged to a retired Officer or discharged soldier or the legal representatives of a deceased Officer or soldier ; *punishment*, fine not less than £5 and not more than £20, together with treble the value of the property, or imprisonment not exceeding six months, or both.

**s. 156 (1) ; A. Amend. Act, No. 2, s. 6 ;**

**A. (Ann.) Act, 1918, s. 11 (1) ;**

**A. (Ann.) Act, 1919, s. 12.**

- (j) Where any such property is found in a person's possession, unless he can satisfy the Court

he came into possession lawfully ; *punishment* as for an offence under (i).

**s. 156 (2); A. (Ann.) Act, 1919, s. 12.**

- (k) Detaining the identity, or life, certificate of a pensioner, or Army Reserve man, as security for debt, renders a person liable to a like penalty as for an offence under (i).

**s. 156 (9).**

- (l) Unlawfully wearing any military decoration, medal, ribbon, badge, etc., authorized by the Army Council ; or supplying any medal or badge without lawful excuse to a person not entitled ; *punishment*, fine not exceeding £20, or imprisonment not exceeding three months. **s. 156A ; A. (Ann.) Act, 1919, s. 13.**

Any witness who is duly summoned to attend a Court-Martial, or the taking of a summary of evidence, and who, after payment or tender of his expenses, fails to attend, or to be sworn, or to give evidence, and any person guilty of contempt of Court towards a Court-Martial, or the Officer taking the summary, may be dealt with by an ordinary Civil Court for contempt as though the offence had taken place before the latter Court. Any witness giving false evidence before a Court-Martial commits perjury, and is liable to be dealt with by a Civil Court for this offence.

**s. 126 ; A. & A.F. (Ann.) Act, 1920, s. 19.**

## CHAPTER XIX

### CUSTOMS OF WAR\*

THE Customs of War are those principles and rules which have gradually grown up from the dark ages to the present time for regulating the conduct of war between two belligerent States. As civilization has advanced, the method of carrying on war has become more humane, and by the general consent of civilized nations certain recognized rules have been adopted. These customs differ from an ordinary law in that there is no tribunal which can enforce them or punish an infraction of them ; but most of them have become, either by long usage, or in many cases by express convention, so well established that no Power would dare incur the just odium of the rest of the civilized world by doing anything contrary to them. Several Conventions and Conferences have from time to time been attended by most of the Great Powers, with a view to drawing up definite rules on different subjects connected with carrying on warfare. Such among others have been :—

1. *The Geneva Convention*, for the amelioration of the condition of the wounded, held in August, 1864.
2. *The Declaration of St. Petersburg*, as to explosive bullets, signed 11th December, 1868.
3. *The Brussels Conference*, on the Customs of War, held in 1874 ; but which was never ratified.

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\* During the late War many departures from these previously recognized Customs took place ; but as no authoritative statement has yet appeared notifying the changes that will be made in them, it has been thought better to leave this Chapter unaltered until such a pronouncement is published.

4. *The Peace Conference at the Hague*, held, on the initiation of the Emperor of Russia, from 18th May to 29th July, 1899.
5. *The Geneva Convention*, for the amelioration of the condition of the wounded, signed 6th July, 1906.
6. *The Second Peace Conference at the Hague*, held in 1907.

**Man., XIV, 4 ; Holls, pp. 36, 134, 335.**

This Second Hague Conference considered the existing Customs of War, and to complete the work of the First Conference drew up a Convention concerning the Laws and Customs of War on Land, which was signed on the 18th October, 1907, by the Plenipotentiaries of forty-two states, and has since been ratified by seventeen of the great Powers represented at the Conference, and which replaces the Convention of the First Conference, signed on the 29th July, 1899. The rules therein laid down are expressly declared to be binding on the Signatory Powers, in case of war between two or more of them (unless either side has a Non-Signatory Power as an ally) until a year after any Power may declare its intention to renounce the Convention. It was further agreed that each Power should issue to its Army, "Regulations for the Conduct of War." This has been done in the case of our Army by the issue from the War Office of a small book, "Land Warfare," 1912.

**Man., XIV, App. 6.**

At the same time three other Conventions were signed by various representatives of the Great Powers respecting (i.) The Opening of Hostilities ; (ii.) Bombardments by Naval Forces ; and (iii.) The Discharge of Projectiles and Explosives from Balloons.

**Man., XIV, App. 5, 8, 9.**

A Convention concerning the rights and duties of Neutrals, although signed by the British representatives, with certain reserves, has not yet been ratified by Great Britain.

**Man., XIV., App. 7.**



The principal points touched on in these Conventions will now be considered separately.

(i.) **BELLIGERENTS.**

By a recognized principle of International Law, every subject of one of the belligerent States is, from the moment war is declared, the enemy of every subject of the other, and all intercourse between them is at an end till the war is over. In practice, however, this strict principle is much modified, and in modern times the subjects of one State have been permitted to remain in the territory of the other, and even carry on their ordinary occupation, provided they do nothing to interfere with the conduct of the war.

**Man., XIV, 11, 14, 15 ; Hall, sec. 126.**

In olden days war was commenced by a solemn and formal declaration of war made to the other Power ; but the tendency of modern practice is for the first acts of war to be contemporaneous with this declaration, and in many cases it has been omitted altogether. By the Convention relating to the opening of hostilities, mentioned above, it is now compulsory on all the Signatory Powers to give due warning before actually commencing hostilities, though no period of delay is fixed, and therefore sudden warnings, followed by immediate action to surprise an unready enemy, are still possible. In this country the commencement of war is announced by a Royal Proclamation, posted in the City of London.

**Man., XIV, 8 ; Hall, sec. 123.**

Although, as just stated, all subjects of an enemy State are, strictly speaking, enemies, in practice they are divided into two classes—viz. : (1) The enemy's armed forces, and (2) the unarmed population. With the latter, so long as they do nothing of a hostile character, the troops of the other belligerent will not interfere. The armed forces, of course, include the regular army, militia, and volunteers of the State, which are usually regularly organized and wear a

recognized uniform. It has, however, always been a disputed point how far hastily raised levies and volunteers assisting the regular troops of their country are entitled to be recognized as regular combatants. It has now been decided that these irregular troops will be entitled to be so recognized provided the following conditions are fulfilled :—

- (1) They must be commanded by a person responsible for his subordinates.
- (2) They must have a fixed distinctive emblem recognizable at a distance.
- (3) They must bear arms openly.
- (4) They must conduct their operations in accordance with the Customs of War.

A further concession is made to a *levée en masse* of the population of a territory not under occupation, who take up arms to resist the invader, and who, though they have not time to organize as above, yet act in strict accordance with the customs of war as laid down in (3) and (4) above.

**Man., XIV, 20 ; Hall, secs. 176-179 ; Holls, p. 141.**

Troops formed of coloured individuals belonging to savage tribes must not be employed in war between civilized States. The employment of disciplined troops belonging to civilized coloured races is legitimate, *e.g.*, our own Indian Army, the African regiments of the French Army, and the negro regiments of the United States Army.

**Man., XIV, 38.**

## (ii.) MEANS OF CARRYING ON WAR.

The right of belligerents to adopt means of injuring the enemy is not unlimited, and the following are expressly prohibited :—

- (a) To employ arms, projectiles, or materials of a nature to cause unnecessary injury ;
- \* (b) To employ poison or poisoned arms ;

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\* But poison gas was used in the late war, and will probably be even more extensively used in future wars, as chemical science develops.

- (c) To deliberately contaminate the enemy's water supply.
- (d) To treacherously kill or wound individuals belonging to the hostile nation or army ;
- (e) To declare that no quarter will be given ;
- (f) To kill or wound an enemy who has laid down his arms, or has surrendered ;
- (g) To make improper use of a flag of truce, the national flag, or military ensign, or the enemy's uniform, or the distinctive badges of the Geneva Convention (*vide* p. 231).
- (h) To destroy or seize the enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war.

**Man., XIV, 42-51, 152, 408, 434 ; Holls, pp. 151, 152 ; Hall, secs. 129, 184, 185, 187.**

With reference to (a) it was decided by the Declaration of St. Petersburg in 1868 that the employment of an *explosive* bullet of less than 400 grammes (a little more than 14 oz.) should be unlawful ; and at the first Peace Conference at the Hague it was further agreed by several of the Powers, to which agreements Great Britain and other Powers have since acceded, to abstain from *expansive* bullets, or the use of projectiles diffusing an asphyxiating or deleterious gas.

**Man., XIV, 41, App. 2, 3 ; Holls, pp. 455, 459, 461.**

\*Great Britain, the United States, and twenty-five other Powers further agreed at the Second Hague Conference in 1907 to abstain until the close of the next Conference from discharging projectiles or explosives from balloons or aircraft. This Declaration has not, however, been signed by France, Germany, and other great military Powers.

**Man., XIV, 41, App. 9.**

Train wrecking and firing camps or military depots are legitimate when done by members of the armed forces.

**Man., XIV, 45.**

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\* This is now quite obsolete, as aircraft were an important arm in the late war, and will be even of more importance in a future war.

The attack or bombardment\* of undefended towns, villages, or houses is prohibited. Before commencing a bombardment, except in the case of an assault, the Commander should give warning to the authorities, and will as far as possible spare buildings devoted to religion, art, or charity, and hospitals and places where sick and wounded are collected, provided these are not used for military purposes. These should be indicated by some distinctive mark. The pillage of a town taken by storm is absolutely prohibited. It is an extreme measure, but the Commander of a besieging force is quite justified in driving back the inhabitants of a besieged town whom the garrison may have turned out with a view to economizing provisions.

**Man., XIV, 117, 122, 124, 125, 129, 133-136, 138 ;**  
**Holls, pp. 152, 153.**

Ruses of war and the employment of methods necessary to obtain information are permissible, provided they are free from treachery. The use of the enemy's uniform is forbidden, and troops captured wearing it could be treated as "war criminals." If, owing to want of clothing, it becomes necessary to wear uniforms captured from the enemy, the distinctive badges should be removed.

**Man., XIV, 139, 152, 154, 155.**

### (iii.) SPIES AND STRATAGEMS.

A spy is one who is found in the zone of operations of a belligerent, with the object of obtaining information clandestinely and in disguise, which he intends to communicate to the enemy. Soldiers in uniform, no matter how cautiously they may penetrate the enemy's lines, are never liable to be considered spies ; neither are civilians who are carrying out their mission openly. During the Franco-German War of 1870-71, the Germans wished to treat persons passing over their lines in balloons as spies, but it has now been definitely decided that such are not spies. It is lawful for a Commander to employ spies, but no one can be obliged

\* During the late war the Germans, in breach of this rule, bombarded several of our undefended coast towns.

to undertake the duty except voluntarily. A spy who is captured in the act is liable to be punished with death, but he must not be punished without a previous trial. A spy who has completed his mission and rejoined the forces to which he belongs cannot, if subsequently captured, be punished for his previous conduct, but must be treated like any other prisoner of war.

**Man., XIV, 145, 158, 161, 162, 169, 170;**

**Holls, pp. 153, 154 ; Hall, sec. 188.**

As already stated, ruses of war are allowable, and any stratagem or means of deceiving the enemy which are not perfidious are permitted, such as false attacks, or the spread of false information, so as to mislead him as to the real intentions of the Commander. But no breach of an express or implied agreement that the truth should be spoken or acted on can ever be justified ; and, as noted above, any improper use of recognized emblems is prohibited, and would be a gross breach of faith. **Man., XIV, 144-146; Hall, s. 187.**

#### (iv.) PRISONERS OF WAR.

All members of the enemy's armed forces and followers, provided they can produce a certificate from their military authorities, are, when captured, entitled to be treated as prisoners of war, unless they have committed a " war crime."

**Man., XIV, 56, 57.**

Prisoners captured by a belligerent must be treated humanely, and only subjected to such confinement as is necessary to prevent their escape. **Man., XIV, 86, 87.** A prisoner attempting to escape may be killed in the act of escaping if necessary, but if retaken, is only subject to disciplinary punishment, not, however, extending to death, *e.g.*, he may in future be kept in closer confinement to prevent a second escape. Prisoners who succeed in escaping are not, if again taken prisoners liable to any punishment for their former flight. **Man., XIV, 74-78.** A general rising among prisoners or other acts of insubordination may warrant the adoption of such severity as may be

necessary to repress them. Prisoners of war are subject to the regulations in force in the Army of the State which has captured them. **Man., XIV, 79, 85 ; Holls, pp. 145, 146 ; Hall, sec. 132.**

Prisoners of war are in the hands of the hostile Government, not those of the individuals who may have captured them. Their arms and other military equipment may be taken from them, but their private property must be left to them. **Man., XIV, 66, 69.** The captor is bound to feed and support them ; and, as a rule, the scale of maintenance should be equal to that of equivalent ranks in the Army of the State in whose hands they are. Officers must be given pay in addition at the same rate as that for Officers of corresponding rank in the captor's Army ; but there is no obligation to pay other ranks, though this is sometimes done. **Man., XIV, 88, 89, 95.** A prisoner, if asked, is bound to disclose his true rank, otherwise he is liable to suffer a loss of the advantages granted to prisoners of his class. **Man., XIV, 67.** In return for this maintenance a State may utilize the labour of prisoners either in the public service or for private individuals, and the wages they earn go towards improving their condition, the balance being paid them on release. Prisoners cannot, however, be employed on any military work ; nor can they be punished or ill-treated for not giving information as to the force to which they belong. Under our military code a prisoner of war voluntarily serving with the enemy is liable to death.

**s. 4 (5) ; Man., XIV, 92-94, 147 ;**

**Holls, pp. 145-147 ; Hall, sec. 132.**

Non-combatants, such as newspaper correspondents, sutlers, or contractors can claim to be treated as prisoners of war if the capturing State thinks fit to detain them. A person who has violated the Customs of War by such acts as killing or robbing the wounded has none of the rights of a prisoner of war, but may be punished with death.

**Man., XIV, 57, 441, 450 ; Holls, p. 148 ; Hall, sec. 131.**

Prisoners may be released on parole ; but there is no obligation on a State to grant a parole, and no obligation on a prisoner to accept one. Indeed, unless the law of his country permits him, he is not at liberty to do so. A superior Officer may give a parole for himself and subordinates, but an inferior Officer may not do so without authority from his superior Officer if the latter is within reach. By English custom a private soldier can only give his parole through a Commissioned Officer. A prisoner who is released on parole is allowed to return to his own country on the understanding that he will not serve again against the same enemy during the same war. This does not prevent his services being employed in duties at home, such as drilling recruits, and he can serve actively in a separate campaign against a distinct enemy. A prisoner cannot promise never to serve again against the capturing State, as he cannot thus divest himself of his allegiance to his own Sovereign. A person who breaks his parole and is retaken is liable to death.

**Man., XIV, 96-101, and notes ; Holls, pp. 147, 148 ; Hall, sec. 133.**

A Prisoners' Information Bureau must be established by each belligerent State, where a record is kept of all prisoners, and through which information concerning them is mutually exchanged. This bureau also takes charge of all personal effects found on battlefields or left by prisoners who have died or been released, and forwards them to the other Government.

**Man., XIV, 102, 103, 105, 107.**

Prisoners of war are usually exchanged by an agreement between the respective States called a *Cartel*, but a belligerent has the right to refuse to exchange, and may keep his prisoners till the end of the war. Exchange is effected by releasing equal numbers of troops of corresponding ranks and quality, a larger number of inferior ranks or quality being given as an equivalent for fewer of a superior class. It is usual to

release surgeons and chaplains, who may have been taken ministering to the wounded, without demanding any equivalent for them. Prisoners who have been thus exchanged are, of course, free to take further part in the campaign. A ship employed in the conveyance of exchanged prisoners of war is called a Cartel Ship..

**Man., XIV, 110, 111, 339 ; Hall, sec. 134.**

#### (v.) SICK AND WOUNDED.

Under the Geneva Conventions already referred to, the sick and wounded of the enemy are to be treated with the same care as those of the captor, but they are prisoners of war, though belligerents can agree to restore to each other the wounded left on a battlefield. **Man., XIV, 175, 178.** \*Mobile military hospitals and ambulances, with their transport, together with the surgeons, nurses, and other attendants, including any guard, are considered neutral, and must be sent back to their own army or country, with all their private property, as soon as their services are no longer required. Such neutrality of course ceases if any of them are employed for purely military purposes. But the fact of their carrying arms or using them in defence of the sick and wounded does not destroy their neutrality. **Man., XIV, 184-187.** A distinctive flag and arm badge (a red cross on a white ground) have been agreed to, for use, in conjunction with the national flag, by all the Signatory Powers in their ambulance service in the field. **Man., XIV, 210, 212 ; F.S.R., Vol. I, s. 194.** Wounded soldiers, who are incapable of further service, are to be sent to their own country as soon as their wounds allow.

Mobile medical units, which accompany an army in the field, retain their neutrality, and must be restored when their personnel are sent back as stated above.

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\* During the late war several instances occurred of Hospital Ships being torpedoed by German submarines, in contravention of these rules.



Hospital buildings, on the contrary, can be captured, but are to be used as such as long as is necessary.

**Man., XIV, 202, 205; Holls, p. 151;  
Hall, sec. 130.**

The dead must be protected against pillage; and, before being buried, examined to see that life is extinct; their identification marks and any articles of personal value must be collected and sent through the Prisoners' Information Bureau to the authorities in their own country.

**Man., XIV, 217-220.**

#### (vi.) INTERCOURSE BETWEEN BELLIGERENTS.

Belligerents are from time to time necessarily brought into non-hostile relations with each other, the formalities connected with which have been arranged for. Such are capitulations, armistices, flags of truce, passports, safe conducts, etc.

**Man., XIV, 221, 223.**

The usual agents for such communications are known as *parlementaires*, whose duties include every form of communication, from the conveyance of a letter or message to negotiations for a capitulation. While performing these duties they must be under cover of a white flag, and are inviolable.

**Man., XIV, 224-228.**

A capitulation is an agreement under which a besieged place, or a body of troops in the field, is surrendered to the enemy on stated conditions. Such agreement must be in accordance with military honour, and when once settled must be scrupulously adhered to by both parties. Commanders of forces in the field are invested with powers to agree to capitulations; but the exercise of these powers is limited by the necessities of the case and to the troops immediately under their command.

**Man., XIV, 301, 306; Holls, p. 155;  
Hall, secs. 189, 194.**

A suspension of arms, or an armistice, is an agreement made for a temporary suspension of hostilities either for a short time for some passing object, or for

a longer time and over a wider area for some more general object. A Commander is deemed to have power to conclude an armistice delegated to him by his Sovereign, and this presumption is so strong that the Sovereign cannot repudiate the act of his Officer, though he can punish him for his conduct. **Man., XIV, 258-260.** A general armistice suspends all military operations between the belligerents; a local one only those between the troops within a named radius. **Man., XIV, 261, 263.** The conclusion of an armistice must be notified by Commanders to their troops in good time, and hostilities are at once suspended, or after an agreed time. In a large theatre of war it would be advisable to fix an hour at which the armistice was to commence, in order to give time for its notification to reach scattered bodies of troops. Too much care cannot be taken in precisely defining the commencement and termination of the truce, and also to state exactly what may or may not be done by the belligerents during its continuance. The generally accepted rule is, that neitherside may profit militarily by a suspension of arms, and thus may not execute any military manœuvre, such as moving troops, repairing fortifications, or re-victualling a besieged place, which would have been impossible for them had not the suspension of hostilities taken place. But such movements in rear of the respective armies, or interior works in a fortress, as could in any case be carried out without interruption by the enemy are not prohibited, and it would be only fair for the besieged to bring in an amount of food equal to that consumed during the armistice, as otherwise the garrison would be put to a disadvantage by the mere fact of the armistice existing.

**Man., XIV, 273-283 ; Holls, pp. 155, 156 ;**

**Hall, sec. 192.**

A flag of truce is used when a belligerent wishes to enter into negotiations with his enemy. The individual (usually an Officer) charged with this mission proceeds,

accompanied by a trumpeter or drummer, a person bearing a white flag, and an interpreter. All of these are inviolate and may not be captured; but the enemy is not bound to receive the flag of truce, and they may be turned back by being fired on after first being signalled to withdraw. **Man., XIV, 229, 234, 237, 242.** If a white flag is hoisted during an engagement, the troops to which it belongs must cease fire, and if the enemy will receive it he must do the same; but he is not bound to cease firing at once, and the other party have no ground for complaint if the bearers of the flag of truce are killed. A belligerent has the right to take any steps necessary to prevent the abuse of a flag of truce, such as blindfolding the party before admitting them within the outposts, etc. In case of abuse he has the right to detain the bearers; or if it is being used to obtain information surreptitiously, they are liable to be treated as spies.

**Man., XIV, 230, 248; Holls, p. 154, 155;  
Hall, sec. 190.**

Passports are written permissions, given by a belligerent to subjects of the enemy, whom he allows to travel without special restrictions in the territory under his control. Safe conducts are similar permissions under which persons to whom they are granted may proceed to a particular place for a specified object. The latter term is also applied to permission to remove goods. Either a passport or a safe conduct may be revoked by the authority who granted it, or his superior, whenever, in his opinion, its continuation would be injurious; but good faith requires that due notice of such resolution should be given to the grantee.

**Man., XIV, 326, 328, 333; Hall, sec. 191.**

#### (vii.) MILITARY OCCUPATION OF HOSTILE TERRITORY.

Territory is considered occupied when actually under the authority of the hostile forces, but the occupation is limited to places where the authority is actually

established and able to assert itself. When such is the fact the authority of the local Government is supplanted by that of the Commander of the invading troops, who rules the country by what is called Martial Law. **Man., XIV, 341.** As a rule, if the local tribunals and officials are able to carry out their duties, they will do so under the orders of the Commander of the forces ; but these may be supplemented or displaced by Military Courts and officials appointed by the invader, into whose hands all authority has passed, and who is responsible for the maintenance, as far as possible, of public order and safety. **Man., XIV, 360, 368.** While individuals may be punished in any way he decrees for breaches of regulations issued to ensure public order and the safety of the troops, no general penalty can be inflicted on the population for the acts of such individuals, for which the community cannot be regarded as collectively responsible. **Man., XIV, 384, 385.** The inhabitants cannot be compelled to take an oath of allegiance to the hostile Power, or to engage in any military operations against their own country. Family honour and rights, private property, and religious liberty must be respected. **Man., XIV, 356, 383.** Pillage is absolutely forbidden, and all property belonging to municipalities, or religious, charitable, or educational institutions, even when State property, is to be treated as private property ; while all seizure or damage to such institutions or historical monuments, works of art or science, or State archives is prohibited. **Man., XIV, 407, 429, 431.** An army of occupation may, however, take possession of any cash or other funds belonging to the State, as well as all depots of arms and other military stores, and may collect the usual taxes, etc., imposed by the State, out of which the expenses of the administration of the occupied territory will be defrayed. **Man., XIV, 430.** *Requisitions*, i.e., provision of goods in kind, and *contributions*, i.e., payment of specified sums of money, may only be levied on the authority

of the Commander on the spot, if the necessities of the occupying army demand it, and must be proportionate to the resources of the country. A similar rule exists as to the enforced services of the inhabitants, which must never be of a nature to involve the population in taking part in military operations against their own country, as already noted.

**Man., XIV, 416-425 ; Holls, pp. 156-160 ;**

**Hall, secs. 153-161.**

**PART II.**

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**CAPTAINS, FOR PROMOTION TO MAJOR**

**[IN ADDITION TO PART I.]**



## CHAPTER XX

### EXECUTION OF SENTENCES AND PRESERVATION OF PROCEEDINGS, ETC.

#### (i.) REMISSION, ETC.

When confirming the Proceedings, either original or revised, the Confirming Officer can mitigate, remit, or commute any or all of the sentence, or may suspend the execution of the same for such time as may seem expedient.

**s. 57 (1).**

*Mitigation* is the awarding a less amount of the same species of punishment; as by reducing the length of a sentence of imprisonment, and is really a partial remission.

**s. 57, note 2.**

*Remission* may be of the whole or part of the sentence, as where a sentence of imprisonment with hard labour is entirely remitted, or the term shortened, or the hard labour remitted.

**s. 57, note 3.**

*Commutation* is changing one kind of punishment for another or others lower in the scale laid down in s. 44; e.g., penal servitude for death, or imprisonment for penal servitude, or in certain cases laid down in s. 83 (7), commuting imprisonment into transfer for general service. If a soldier has been sentenced to imprisonment and discharge with ignominy, and the Confirming Officer commutes the imprisonment to detention, he must remit the discharge with ignominy, as a sentence of discharge cannot accompany one of detention.

**s. 44 (4).** If a soldier has been sentenced to imprisonment, without discharge with ignominy, for a purely military offence, he should, except under very special circumstances, commute the imprisonment to detention.

**K.R., 645 (v.).** A sentence of cashiering in the case of an Officer convicted under s. 16 cannot be mitigated or commuted, as no other punishment could



be awarded, but may be remitted. A Confirming Officer cannot partially commute a punishment and substitute another punishment for the part commuted.

**s. 57, note 9.**

The Confirming Officer may also refuse confirmation, in which case the proceedings are annulled, and the accused can be tried again ; or he may refer the Proceedings to superior authority for confirmation.

**s. 54 (5) ; R.P., 51 (B).** If the sentence is informally expressed, the Confirming Officer can vary the form, and if it is in excess of that allowed by law, he can reduce it to what is legal, and can then confirm the sentence so altered ; but he cannot vary an altogether illegal sentence in this way.

**R.P., 56 (A).**

### *Illustrations.*

1. A sentence of "one year and three months' imprisonment" can be varied to "fifteen months' imprisonment."

2. A sentence of "reduction to the rank of Lance-Serjeant" is altogether illegal, and cannot be varied.

3. A sentence of "fourteen days' confinement to barracks" is illegal, and cannot be varied.

### (ii.) SUSPENSION OF SENTENCES.

When a soldier has been sentenced to penal servitude, imprisonment, or detention, the Confirming Authority, when confirming the sentence, may direct that the man is not to be committed till the orders of a Superior Military Authority have been obtained. This officer may suspend the sentence, in which case it will not begin to count until the soldier is actually committed. If the man has already been committed when the sentence is suspended, he will be discharged, and the currency of the sentence suspended from date of release until he is again ordered to be committed under the same sentence.

Such sentence will be reconsidered by a Competent Military Authority at intervals of not more than three months, and if the man's conduct justifies such action it may be remitted by this authority.

Where, however, a Serjeant was sentenced to reduction to the ranks and three months imprisonment, and the imprisonment was suspended and subsequently remitted, it was held that this remission referred only to the imprisonment and the sentence of reduction stood.

If a soldier under a suspended sentence is again sentenced to penal servitude, imprisonment, or detention, a Superior Military Authority may order the two sentences to run concurrently or consecutively, provided that the total term of imprisonment or detention under the two sentences does not exceed two years. A sentence of penal servitude, whether suspended or not, avoids any previous sentence of imprisonment.

The term "Superior Military Authority" means the Army Council and any General Officer or Colonel Commandant whom they may appoint; or on active service beyond the seas, the Officer Commanding the force and any General Officer or Colonel Commandant whom he may appoint. The term "Competent Military Authority" means any Superior Military Authority and any Officer not below the rank of Field Officer duly authorized by him. **s. 57A; A. & A.F. (Ann.) Act, 1920, s. 15.** A list of Superior Authorities authorized by the Army Council was published in A.O.  $\frac{312}{20}$ .

### (iii.) EXECUTION OF SENTENCES.

The Confirming Officer is responsible for the execution of the sentence, and will give the necessary orders for carrying it out; or he may, if necessary, suspend the execution of it for such time as seems expedient.

#### **s. 57.**

Soldiers sentenced in India or a Colony to penal servitude, or to imprisonment or detention exceeding twelve months, are, as soon as practicable, to be transferred to a prison or detention barrack in the United Kingdom; unless, in the case of imprisonment or detention, the Court specially orders that the punishment

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is to take place abroad, or unless the soldier belongs to a class in respect of which the Secretary of State has declared that it would not be beneficial to the soldier to so transfer him, by reason either of the climate or place of his birth, or of the place of his enlistment. **s. 131 (2).** The Channel Islands and the Isle of Man are deemed to be Colonies for the purposes of execution of sentences of imprisonment and penal servitude.

**s. 187 (2).**

A person sentenced by Court-Martial to penal servitude is called a "military convict." **s. 58.** Sentences of penal servitude are carried out in an ordinary convict prison, called in the Army Act a "penal servitude prison," under the orders of the Home Secretary, **ss. 59-62** ; an Officer sentenced to penal servitude must be first cashiered, **s. 44 (2)**, and a soldier so sentenced must be discharged. **K.R., 363 (xii.).**

A person sentenced in India or a Colony to penal servitude may be temporarily confined in an authorized prison, *i.e.*, one which the Governor-General in India, or the Governor of the Colony, has, with the concurrence of the Secretary of State, appointed for that purpose. **s. 62 (2).**

Sentences of imprisonment are carried out either in a public prison or a military prison. **s. 63 (1).** A soldier who has been convicted of an offence of a disgraceful nature under sections 17, 18 (4), (5), or 41, will be sent to a public prison ; in other cases, he will be committed to a military prison, unless the term of imprisonment is short, and he is not to be discharged with ignominy, when he may, at the discretion of the Confirming Officer, undergo his sentence in a detention barrack. **s. 130 ; K.R., 672.**

A public prison is one in which ordinary criminals are received, and is under the management of the Home Secretary. A military prison is under the management of the Secretary of State for War, and only soldiers (or sailors of the Royal Navy or airmen) are confined therein. **s. 133 (notes).**

A soldier awarded detention, either by Court-Martial or his Commanding Officer, will undergo his sentence in a detention barrack if the sentence exceeds 168 hours ; when the sentence does not exceed 168 hours it may be carried out in a branch detention barrack or in a duly certified barrack detention room.

**K.R., 672 (ii.), 709.**

A soldier sentenced to detention or field punishment on active service cannot be committed to a military prison in the field. A sentence of detention must therefore be commuted to field punishment unless it is intended to transfer the soldier to a detention barrack at home or in the country where he is serving.

All the former central and district military prisons, with the exception of Woking, are now called detention barracks, and the former branch prisons are now branch detention barracks ; and are used for the confinement of men sentenced to detention, or, in the special cases mentioned above, to imprisonment.

**K.R., 709, 711 ; A.O.  $\frac{495}{20}$ .**

Soldiers sentenced to imprisonment for offences of a purely military nature will be committed to the military prison at Woking.

**A.O.,  $\frac{495}{20}$ .**

A military prisoner sentenced to imprisonment out of the United Kingdom, if he is in any place mentioned in any of the groups in the first column of R.P., 130 (A), may if necessary be removed to a *military* prison or detention barrack anywhere, or to an *authorized* prison in any place in the second column of the Rule opposite the group ; but unless for some special reason which must be reported to the Secretary of State a prisoner will not be removed to a *military* prison if he could not be removed to an *authorized* prison in that place. A prisoner can never be removed from a prison in the United Kingdom to a prison outside the United Kingdom. **s. 65 (1) (c) ; R.P., 130 (A), and note.**

A soldier under detention in any place out of the United Kingdom may be removed to a detention

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barrack or branch detention barrack anywhere ; but he cannot be removed from a detention barrack *in* the United Kingdom to another outside the United Kingdom.

**s. 65 (1) (c) ; R.P., 130 (B).**

Sentences of penal servitude, imprisonment, or detention, commence to count from the date the original Proceedings were signed, whether the sentence is the original or a revised sentence, and even although the punishment has been substituted in commutation for a severer one. Thus, if a soldier is already under sentence of imprisonment, any fresh sentence of imprisonment will run concurrently with the unexpired term of his former sentence. **ss. 57 (5), 68 (1).** This does not apply to a suspended sentence.

**s. 57A (3).**

### *Illustrations.*

1. Private A. is sentenced to forty-eight days' imprisonment on the 10th March, 1923. The imprisonment will begin to count from that date.

2. Corporal B. is sentenced to be reduced to the rank of Lance-Corporal on the 1st April, 1923. The Court re-assembles for revision on the 4th April, and revokes this void sentence and passes a sentence of fifty-six days' imprisonment. The imprisonment will begin to count from the 1st April.

3. Private C. is sentenced to five years' penal servitude on the 15th May, 1923. The Confirming Officer commutes the sentence to two years' imprisonment on the 23th May. The imprisonment will begin to count from the 15th May.

4. On the 15th January a Court sentence a soldier to death for "desertion when under orders for active service" ; the Court is re-assembled for revision on the 29th January, and the Confirming Authority points out that there is not sufficient evidence to prove that the accused was "under orders for active service." The Court, therefore, revoke the former finding and sentence, and pass a sentence of two years' imprisonment. This will be reckoned from the 15th January.

5. On the 3rd May a Court are trying a soldier who is undergoing a sentence of 56 days, awarded on the 14th April ; they wish to give him 84 days for the present offence. To effect this they must pass a sentence of 121 days, because he has still 37 more days to do under his former sentence, which will run concurrently with that now awarded.

When a military convict, or prisoner, or soldier under detention, or person subject to military law charged with an offence, has to be sent by sea without an escort, or with an insufficient escort, he can be handed over to the Commander of the ship, or anyone acting under his authority, and the order authorizing his conveyance by sea will be a sufficient authority for the Commander of the ship to keep him in military

custody. But the Commander of the ship cannot be obliged to receive the man into custody.

**s. 172 (5) ; K.R., 690.**

(iv.) PROVOST-MARSHAL.

A General Officer Commanding a body of troops abroad may appoint a Provost-Marshal, who will always be a Commissioned Officer ; his assistants may be Officers or Non-Commissioned Officers. His duties are, to arrest offenders, and he may carry into execution any punishment inflicted by sentence of Court-Martial, but he no longer has any power to inflict punishment on his own authority. When any soldier is undergoing field punishment in the custody of a Provost-Marshal or his assistants, he or they have the same powers as the governor of a military prison with respect to the prisoner. (*Vide ante*, p. 157, as to his duty at a Field General Court-Martial.

**s. 74 ; K.R., 665 ; F.S.R., Vol. I, ss. 27 (5), 81.**

(v.) REMISSION, ETC., AFTER CONFIRMATION.

After a sentence has been confirmed, the under-mentioned authorities still have the power at any time to mitigate or remit any part of the punishment, or to commute it to a less one, provided always that this power must not be exercised by any Officer holding an inferior command to that of the Officer who originally confirmed the sentence.

The King, the Army Council, the General Officer Commanding the Command, the Officer in charge of Administration of the Command, the General or other Officer Commanding the District, Division, or Independent Brigade, or the Commander of the Coast Defences, where the soldier is, can exercise this power as regards offenders anywhere.

In India, the Commander-in-Chief in India, or such other Officers as he, with the approval of the Governor-General, may appoint.

In a Colony, the Officer Commanding ; and elsewhere, the Officer Commanding the Forces at that place. **s. 57 (2), (3) ; A. & A.F. (Ann.) Act, 1923, s. 4 ; R.P., 126 (c).**

In consequence of the amendment of s. 57 this power of remission, etc., after confirmation now applies to *all* sentences, such as dismissal or reduction to the ranks.

**A.C.I.  $\frac{242}{23}$ .**

If after confirmation it appears that the Proceedings are illegal or the accused has suffered serious injustice, the Confirming Authority should cancel the confirmation and order all record of the conviction to be removed. The same action will be taken by any superior Authority before whom the Proceedings come for review. At home reference should be made to the Judge - Advocate - General before Proceedings are quashed.

**K.R., 655.**

If after confirmation a sentence is found to be invalid, the Authority who would have had power to commute, may pass a valid sentence, provided that it is not higher in the scale of punishments than the invalid sentence, nor, in his opinion, in excess of it.

**s. 70 (1) (e) ; R.P., 54 (c).**

#### (vi.) RESTITUTION OF STOLEN PROPERTY.

When any person has been convicted of stealing, embezzling, or feloniously receiving any property, the Army Council or the Confirming Authority may order that such property, or any part of it, found in the possession of the offender, shall be restored to the owner, and a like order may be made with respect to any property in the accused's possession which appears to have been obtained by the conversion or exchange of any of the stolen property. Moreover, if any such property has been pawned or sold to another who acted innocently, this person may, on restoring it to the owner, apply to be reimbursed the amount given in purchase or pawn, out of the money in the offender's possession.

**s. 75.**

## (vii.) LOSS OF PROCEEDINGS.

If the original Proceedings of any Court-Martial, or any part thereof, are lost, any copy certified by the President or Judge-Advocate may be accepted in lieu, or if there is no such copy but sufficient evidence can be obtained of the charge, finding, sentence, and transactions of the Court, this evidence may be accepted if the accused consents. Such substituted copy or evidence can be confirmed and will be as valid as the original Proceedings. If in a case where confirmation is required no such copy or evidence is forthcoming, or if the accused does not give the consent required above, then the accused can be tried again, and the issue of an order convening the new Court will render the former Proceedings null and void.

**R.P. 100.**

## (viii.) PRESERVATION OF PROCEEDINGS.

The Proceedings of all Courts-Martial are, after promulgation, sent to the Judge-Advocate-General in London or India, or to the Admiralty (in case of Marines), and are there preserved for seven years from the date of confirmation or acquittal in the case of a General Court-Martial, or three years in the case of any other Court.

**R.P., 98 (A).**

During the time the Proceedings are preserved the accused has the right to obtain a copy of them or any part of them on payment of the actual cost of the copy, not exceeding twopence for every folio of seventy-two words. **s. 124; R.P., 99.** If the accused has died during this period, his next-of-kin has the same rights within twelve months after the death of the accused.

**A. & A.F. (Ann.) Act, 1920, s. 19**



## CHAPTER XXI

### DISCIPLINE ON BOARD SHIP

TROOPS are sometimes embarked on board one of His Majesty's ships for conveyance to foreign parts ; formerly nearly all movements of troops to and from abroad were carried out by troopships, *i.e.*, vessels belonging to the Royal Navy. By the Naval Discipline Act, 1866, it is enacted that, whenever troops are embarked on board any of His Majesty's ships, they are to be subject to the provisions of that Act, in such manner as may be directed by Order in Council. **29 & 30 Vict., c. 109, s. 88.** The Army Act specially lays down that nothing contained in it is to affect the application of the Naval Discipline Act or any Order in Council made thereunder. **s. 186.**

The latest Order in Council, made under the authority of the last-mentioned Act, is that of 6th February, 1882 (as amended by Orders in Council of 30th June, 1890, of 13th February, 1912, and of 4th May, 1923), and the chief points in it are as follows :—

All troops on board are under the command of the Captain of the ship and the senior Naval Officer present, and all under the equivalent rank of Captain in the Navy, or doing duty with troops, are under the Officer of the Watch. Any offence against the discipline of the ship is made an offence against s. 40 of the Army Act. The Captain of the ship can have any offender put in arrest or confinement. If the offence is such that it can only be adequately dealt with by General Court-Martial or District Court-Martial, the offender will, with the Captain's concurrence, be disembarked at the first opportunity for trial, as these Courts cannot be held on board a King's ship. If

a private soldier commits a serious offence, the Captain of the ship can deal with it, and can, by warrant under his hand and that of the Commanding Officer of the troops, sentence him to either (1) imprisonment with hard labour or detention up to 42 days ; (2) confinement in a cell up to 14 days ; or (3) stoppages. These punishments are equivalent to Court-Martial convictions or Commanding Officer's punishments, as the case may be. The Commanding Officer can also award stoppages. In the event of the Naval and Military Commanding Officers not agreeing as to the disposal of the case, the offender will remain in arrest until the matter can be referred to superior authority. The Captain of the ship must give the Commanding Officer of the troops written authority to award certain minor punishments specified in the Summary Punishment Table annexed to the Order in Council. Three of these relate to stoppage of smoking and answering at roll-calls with varying frequency, and correspond to confinement to barracks ; the others are fines for drunkenness and extra guards, corresponding to the same punishments on shore. As far as is consistent with the discipline of the ship, the troops are to be dealt with by their own Officers, and orders are to be conveyed through them.

**A.O. <sup>235</sup>/<sub>23</sub> ; Man., pp. 728-733.**

It has been ruled in the Judge-Advocate-General's Department, in India, that a ship of the Royal Indian Marine is not a " ship commissioned by His Majesty," and a Court-Martial under the Army Act may be legally held on board such a ship.

Movement of troops by sea is now usually carried out by *transport*, i.e., a ship exclusively at the service of the Government on a time charter ; or a *troop freight-ship*, i.e., a ship in which passage is engaged for troops, but which is not wholly at the disposal of the Government.

**K.R., 1081.**

The command of the troops on board any ship will, as a rule, be vested in the senior combatant Officer doing duty, and an Officer senior to him, who happens to be on board as an indulgence passenger is only to assume command if a serious emergency arises. The responsibility for deciding whether such an emergency exists will rest upon this latter Officer. **K.R., 1168.**

On board a King's ship the Commanding Officer's powers would be limited as described above ; but on board a transport he would have all the powers of a Commanding Officer, and if he had a warrant enabling him to do so he could convene a District Court-Martial, notwithstanding that he had investigated the case. **K.R., 610.** At home the General Officer Commanding-in-Chief the Command in which the port is, and elsewhere the General or other Officer at the port of embarkation, authorized to issue warrants for District Courts-Martial, is responsible that the Officer Commanding the troops on board (not below the rank of Captain) is given the necessary warrant to convene and confirm such Courts. **K.R., 1079.** If the troops were on active service, a Commanding Officer of any rank could convene a Field General Court-Martial.

**s. 49 (1).**

A Brigade Commander may, on the embarkation of two or more detachments, associate them for purposes of discipline under the command of one Officer ; in which case the powers of the Officers Commanding the several detachments to award summary punishments will be in abeyance.

**K.R., 516.**

Whenever troops are embarked on board any ship, whether a King's ship or a hired transport, they carry with them the military law to which they were subject at the port of embarkation, except that the sentence of any Court held on board ship may be confirmed at the place of disembarkation, as though the offender had been tried at this latter place. **s. 188.**

A man can be tried on board a transport for an offence committed before embarkation.

## CHAPTER XXII

### DUTIES IN AID OF THE CIVIL POWER

ONE of the most difficult, and perhaps disagreeable, duties that troops can be called upon to perform in time of peace, is to be called out in aid of the Civil Power. It must be clearly understood that in law the soldier has exactly the same liabilities—and no other—in the maintenance of public order as any ordinary citizen. A soldier does not cease to be subject to the ordinary law of the Realm by becoming subject to military law, and it is the Common Law duty of every citizen to assist the Authorities in the quelling of public disorder. Owing to the fact that soldiers, acting in their military capacity, can only act by using their arms, and that their arms are very deadly, it has been laid down on high authority that it should be the last expedient of the Civil Authorities to call out the troops to their aid.

**Man., XIII, 14, 34 ; Dicey, pp. 282, 284, 297.**

The different kinds of public disturbances are classified in our law as unlawful assemblies, routs, riots, or insurrections.

*An unlawful assembly* is an assembly of three or more persons with intent to carry out any common purpose, lawful or unlawful, in such a manner and under such circumstances as to inspire fear in persons of ordinary courage or to cause them to apprehend a breach of the peace. An actual act of violence by one of the assembly is not necessary to constitute the meeting unlawful if its character is such as to alarm persons of reasonable firmness and courage.

**Man., XIII, 2 ; Stephen, Crim., Art. 75.**

*A rout* is an unlawful assembly which has made a motion towards the execution of the common purpose.

**Stephen, Crim., Art. 76.**

A riot is an unlawful assembly which has actually begun to execute a common purpose of a *private* nature by a breach of the peace and to the terror of the public. An assembly which was originally lawful may become a riot if they execute any such purpose to the terror of the public, even though they had not this purpose in mind when they assembled.

**Man., XIII, 4 ; Stephen, Crim., Art. 77.**

An *insurrection* differs from a riot in having an object of a *general* and *public* nature, and is really a species of treason known technically as levying war against the King.

**Man., XIII, 6 ; Stephen, Crim., Art. 54 ;  
Archbold, p. 956.**

### *Illustrations*

A large number of people assemble in a tumultuous manner, armed with sticks and other weapons, to protest against the closing of a public way, and with the intention of removing the barrier. This is an unlawful assembly.

The mob move off in the direction of the barrier, which they intend to demolish. This is a rout.

The mob, arrived at the barrier, proceed to remove it in a violent and riotous manner. This is a riot.

A party of men on strike assemble to discuss their grievances. This is *not* an unlawful assembly provided the circumstances of their meeting are not calculated to inspire terror to the public.

Inflamed by the speeches of one of the orators, they rush off and attack all the bakers and other food shops in the vicinity. This is a riot.

A mob assembles and attacks a prison with a view to obtaining the release of some of the prisoners therein. This is an insurrection.

The liability of the various branches of the military forces to be called out *as such* in aid of the Civil Power is as follows :—

The Regular Forces are liable, not by any Statute, but by custom, and Parliament has recognized their employment on this duty by granting allowances.

**Clode, Vol. II, p. 138.**

The Army Reserve are liable. This includes the Militia.

**R.F. Act, s. 5.**

The Territorial Army is not liable to be called out, no provision for this being made in the Act ; but if they are actually embodied they can be used like any other troops. They may always avail themselves of their organization to resist an attack on their armouries or storehouses, and use their arms if necessary.

**T.F.R., 404, 407 ; A.O. <sup>322</sup><sub>15</sub>.**

The amount of force that may be used in dispersing an unlawful assembly, or in quelling a riot or insurrection, must depend on the nature of each case, the general rule being that no more force is to be used than is necessary to effect the purpose. As stated above, there is no distinction in law between the duties and liabilities of the soldier or of any ordinary citizen in assisting to quell such disorders. The regulations direct that troops are, except in sudden and great emergency, only to be taken out to aid the Civil Power on requisition by a Magistrate or Chief Constable, and that they are to be accompanied by a Magistrate while performing the duty. This being so, it is proper for the Officer in command to place himself under the Magistrate's orders, and not to take action until requested by him to do so. This request should be in writing, but it is not legally necessary that this should be the case. The Officer is, however, responsible for what he does, and if he considers force unnecessary he need not use it. On the other hand, if force becomes necessary, he is justified in using it, even though not so requested by the Magistrate, and he may be called to account for not taking the necessary action. Should his behaviour afterwards be the subject of judicial inquiry, the fact that he acted on the Magistrate's order will naturally be taken into consideration as evidence of his good faith ; but he will have to answer for his own acts. The law of the land holds no one compelled to obey an illegal order, or indeed justified for his illegal action because it was ordered by a superior. Hence neither the Officer nor the men are justified in using unnecessary force, the one simply because the Magistrate directed it, or the others because the Officer ordered it.

**Man., XIII, 13, 35 ; K.R., 1305-1313 ;**

**Dicey, 285, 298 *et seq.***

Unlawful assemblies and riots are misdemeanours, punishable by fine and imprisonment ; in order, however, to give the Civil Power authority to disperse

dangerous assemblies before they actually proceed to violence, an Act was passed in the reign of George I, called the Riot Act, which gives the Magistrate and those acting with him special power. By this Act it is provided that, whenever the Magistrate thinks it necessary, he may make the proclamation laid down in the Act. He approaches as near to the rioters as he can with safety, and having commanded silence, reads the proclamation, which charges all persons there assembled to depart at once to their habitations or lawful business. This is erroneously called "reading the Riot Act." It has been decided that the words "God save the King" at the end of the proclamation are essential, and must be read. Before the proclamation is read the "*Alarm*" should be sounded, if possible, to call attention to what is going to be done. The Magistrate should take a note of the time of making the proclamation, and preserve the paper from which read. The effect of this reading is, that if the persons assembled, to the number of twelve or more, remain together for one hour afterwards, they are guilty of felony, and become liable to penal servitude for life. They may be at once apprehended by the Magistrate, and any persons assisting him, and if any of them are killed or injured in the attempt to apprehend or disperse them, the Magistrate and those assisting him are held indemnified. If the reading of the proclamation is prevented by the rioters, those hindering it, and those remaining, are liable to the same punishment as if it had been read. **Man., XIII, 19-22 ; K.R., 961 ;**

**Stephen, Crim., Art. 78, and note.**

It has often been supposed that after the reading of the proclamation nothing can be done, and the troops must remain passive till an hour has elapsed, even though the rioters proceed to extreme violence. This view is, however, quite erroneous. The Act is not negative, and does not in any way prevent necessary force being used at any time after the reading of the proclamation, or even without its being read at all.

It only provides that after the lapse of an hour the rioters become felons, and fully indemnifies those acting against them for any injuries suffered by them.

**Man., XIII, 23, 24 ; Dicey, p. 286 ;**

**Clode, Vol. II, pp. 129, 130.**

The following rules are laid down in the King's Regulations for the guidance of troops acting in aid of the Civil Power. Troops are not to be taken out on this duty, except in cases of great and sudden emergency, without a requisition in writing or by telegram of a Magistrate or Chief Constable. If the disturbance takes place near where the troops are quartered, the Commanding Officer will use his discretion as to the necessity for complying with the requisition. The Military Authorities will fix the number, and arrange for their despatch, and will inform the Civil Authority of the time they will arrive. **K.R., 1305.** The latter must arrange for their accommodation, food, etc., and for conducting them to the place where their services are required.

**K.R., 1306, 1307 ; Clode, Vol. II, p. 143.**

The troops must march in regular military formation, with the usual precautions, and must be accompanied by a Magistrate. **K.R., 1308.** The detachment will be told off into four sections, each under an Officer or Non-Commissioned Officer, if the total strength is not more than twenty files ; if it exceeds that number, it will be told off into more than four sections.

**K.R., 1316.**

If the police are unable to cope with the disturbance, the Magistrate will request the Commanding Officer "to take action." As already stated, this request should be in writing, but not necessarily so. **K.R., 1311.** The Officer will then act according to his discretion. If he thinks immediate action unnecessary, he need not act at once ; if he thinks it necessary to fire, he will give the order. **K.R., 1313.** If he considers a small amount of fire will suffice, he will only order named files



or sections to fire ; and they only will fire, and only by order of their Officer ; and all action will cease as soon as the Officer thinks further force unnecessary. **K.R., 1317.** Before fire is opened, the mob should be warned that it will be effective. **K.R., 1315.** Fire must not be directed over the heads of the crowd, as that might only injure persons not engaged in the riot.

**K.R., 1320.**

The existence of an armed insurrection would justify the use of any degree of force necessary to effectually suppress it. **Man., XIII, 33.** In times of general insurrection it has been often necessary for the Executive to employ what is known as Martial Law. This is a term about which much confusion exists. Martial Law, in the proper sense of the term, in which it means the suspension of ordinary law and the temporary government of the country, or parts of it by Military Courts, is unknown to our English Law. Foreign Countries recognize what is called "a state of siege," under which the authority of the Civil Power passes temporarily into the hands of the Military ; but we have nothing equivalent to this. What is meant by Martial Law in English Jurisprudence is the Common Law right of the Crown and its servants to repel force by force in case of insurrection or any violent resistance of the law. **Man., I, 15, 17 ; Dicey, pp. 283, 284.**

Thus, when Martial Law has been proclaimed in our Colonies (as it was in Cape Colony during the late Boer War), it is an announcement to the public that the provisions of the Civil Law are inadequate to meet the situation, and an intimation to the Military Authorities that the Executive is willing that they should take exceptional measures to cope with the circumstances which the Civil Law is unable to deal with. Martial Law thus does not replace the Civil Government, but only supplements it.

**Mart. Law, p. 78.**

Under Martial Law, thus proclaimed, civil rights and liberties are in abeyance, and the Military Authorities can arrest suspected persons without warrant. In the United Kingdom, rebels when arrested would always be handed over to the Civil Courts for trial, as our system of Jurisprudence does not sanction Military Courts dealing with any such persons not subject to Military Law. **Clode, Vol. II, p. 169.** In the Colonies, however, under Martial Law, Military Courts have been formed with power of dealing with persons committing offences against it. Such Courts were established at the Cape. The offences with which they could deal were—

- (a) Treasonable or seditious acts or language.
- (b) Joining or aiding the enemy, or carrying on trade with him.
- (c) Destroying railways, or other acts endangering the forces.
- (d) Serious breaches of Martial Law Regulations.  
**Mart. Law, p. 101.**

Such Courts may be composed of Officers or civilians, or a mixture; their procedure will as far as possible follow that of a Court-Martial, and care must be taken to afford the accused every reasonable facility for making his defence. Officers administering Martial Law must be very careful to see that the offence was committed, and the accused tried, within a proclaimed district. It must be remembered that, though necessary, this action under Martial Law is, strictly speaking, illegal, but those who have acted *bona fide* in the interests of the State have nothing to fear; for an Act of Indemnity is always subsequently passed, justifying the measures taken; and, even failing this, the Crown can refuse to prosecute, by a *nolle prosequi*, or can nullify an unjust conviction, by a free pardon.

**Man., I, 15; Mart. Law, pp. 81-84; Dicey, pp. 47, 228 et seq., 303, and note; Clode, Vol. II, p. 162.**

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## CHAPTER XXIII

### HISTORY OF MILITARY LAW

IN the early days of our history, Military Law, as distinct from the ordinary law, only existed during war time. The *fyrd* of Anglo-Saxon days (from which our Militia has descended) was organized and governed by the ordinary laws of the land ; and in later days the existence of the feudal levies was based on the ordinary law dealing with the tenure of land. When war broke out and these troops were called out for service, they were governed while in the field by Ordinances or Articles of War made by the Crown, or by the Commander-in-Chief under authority delegated to him by the Crown. These Articles only remained in force so long as the war lasted, and when the troops were disbanded their operation ceased. Thus in time of peace there was no Military Law in those days ; although various attempts were made by the more despotic of our Sovereigns to enforce Military (or as it was then called, " Martial ") Law by the prerogative of the Crown during peace time.

**Man., II, 3, 7.**

On the establishment of a standing army after the Restoration in 1660, the necessity for special powers to keep this force in " an exact state of discipline " soon became felt, and on the 3rd April, 1689, the first Mutiny Act was passed to punish mutiny and desertion. This Act was only to last six months ; but on its expiration another was passed, and, with a few exceptions, a Mutiny Act was passed annually till 1878, inclusive. Owing to the jealousy of Parliament over the control of the military forces of the Crown, the duration of the Act was always limited to one year.

**Man., II, 16-20.**

The earlier Mutiny Acts did not extend abroad ; but until 1712 the nation was almost constantly at war, and the troops on active service were governed by Articles of War made as of old under the prerogative of the Crown. In this year statutory power was given in the Mutiny Act to the Crown to make Articles of War binding on the troops in time of peace out of the United Kingdom. This power was extended to troops at home by the Mutiny Act, 1715. In 1718 the Mutiny Act was extended to apply to troops in the Colonies, who were thus governed by the Act and the Statutory Articles of War, made by the Crown under it, until 1803 ; the prerogative power of the Crown to govern the troops in foreign countries during war by Articles of War still remaining.

**Man., II, 22-29.**

In 1803 the Mutiny Act and the Statutory Articles of War were extended to the army, whether serving within or without the Crown's dominions ; and thus the prerogative power of making Articles of War in time of war was superseded.

**Man., II, 31, 32.**

Things continued thus until 1879, when the inconvenience of having the army governed partly by an Act of Parliament and partly by Articles of War led to their being combined in one Statute, called the Army Discipline and Regulation Act ; the law as to enlistment being embodied in the same Statute. In order to obviate the necessity of annually passing this long Act through Parliament, while at the same time continuing the constitutional control of Parliament over the standing army, it was enacted that the provisions of the Act should be continued from year to year by a short Act, called the Army Discipline and Regulation Commencement Act. After a lapse of two years the Army Discipline and Regulation Act was repealed, and its provisions re-enacted in the present Army Act, which is similarly continued in force yearly by the Army (Annual) Act, as described in Chapter II.

**Man., II, 33-35.**

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## CHAPTER XXIV

### THE LAW RELATING TO THE RESERVE FORCES

THE Reserve Forces are governed by the Reserve Forces Act, 1882, and other short Acts passed in 1890, 1898, 1900, and 1906 ; the Territorial and Reserve Forces Act, 1907 ; and the Territorial Army and Militia Act, 1921. As already stated in Chapter III, they are, under certain circumstances, subject to military law, and are then subject to the provisions of the Army Act.

**s. 176 (5).**

Under the Act of 1882 it is lawful for the Sovereign to keep up an Army Reserve of such numbers as may be provided by Parliament, consisting of two classes, viz. :—

**Class I.**—Men who, having served in the Regular Forces, are either transferred under the Army Act, or enlisted or re-engaged under this Act ; and who are liable to be called out for permanent service anywhere.

**Class II.**—Out-pensioners of Chelsea or Greenwich Hospital (Marines), or men who, having served their full time in the Army, are enlisted or re-engaged under this Act, and who are only liable for service in the United Kingdom.

**R.F. Act, s. 3.**

Class II is now non-existent.

**Man., XI, 31.**

Under the Territorial and Reserve Forces Act, men who have never served in the Regular Forces can also be enlisted into Class I of the Reserve, and are known as Militiamen. Such men enlist for six years, and may re-engage for further periods of four years.

**T. & R.F. Act, s. 30 (1) ; T.A. & M. Act, s. 2 ;**

**R.S.R., 140.**

All men of the Army Reserve can be called out—

- (i.) Annually, for training for twelve days or twenty drills, and when so called out may be attached to a body of Regular or Auxiliary Forces. **R.F. Act, s. 11.**

Men of the Militia may be called out for six months' training on enlistment, and fifteen or twenty-one days' annual training, and in addition for special courses of training for any periods not exceeding six months in all. **T. & R.F. Act, s. 30 ; T.A. & M. Act, s. 2 ; R.S.R., 135, 278.**

- (ii.) In aid of the Civil Power, by the Secretary of State, or Lord Lieutenant of Ireland ; or, as far as regards the men living in any town or district, by the Officer Commanding the troops there. **R.F. Act, s. 5.**

- (iii.) On permanent service, by Proclamation issued by the King in Council, in time of great emergency or national danger. If Parliament is sitting, the occasion must first be communicated to them ; and if not sitting, Parliament must be assembled within ten days to have the communication made to them. Men thus called out are liable to serve till no longer required, or until their service has expired under the Army Act, s. 87 ; or the King may issue a proclamation that the Militia only are to cease to be called out. **R.F. Act, ss. 12, 13 ; T. & R.F. Act, s. 30 (5) ; T.A. & M. Act, s. 2 ; K.R., 416.**

On being called out on permanent service a man becomes part of the Regular forces, and can by the Competent Military Authority be posted to any corps and within three months of such posting can be transferred to any other corps. **R.F. Act, s. 13 (2).**

A certain number of men in the 1st Class Reserve, not exceeding 6,000 in all, whose character on transfer

s\* 2

was not less than "good," may agree in writing to be liable, during their first year's service in the Reserve (or in special cases for an additional year), to be called out for service abroad in warlike operations. These men may be called out without the proclamation above mentioned, and it is not necessary to assemble Parliament, but the exercise of the power must be reported to Parliament as soon as possible. Men thus called out are not liable to serve more than a year, and may revoke their agreement by three months' notice in writing. **R.F. & M. Act, s. 1 ; K.R., 401, 416.** Militiamen, to the number of 4,000, may make a similar agreement for the whole or any part of their reserve service. **T. & R.F. Act, s. 32 ; R.S.R., 3, 137.**

It is lawful for His Majesty or the Secretary of State to make regulations under the Act for the government, discipline, and pay of the Reserve. **R.F. Act, s. 20.** Under the regulations now in force the Army Reserve consists of the Militia and the following classes and sections which make up Class I :—

**Section A.**—Consisting of the men referred to above, who are liable to be called out for small wars. On completing their first year's or two years' service in the Reserve they are transferred to Section B.

**Section B.**—The ordinary Reserve men, transferred under the terms of their original enlistment on the termination of their army service ; or who have been allowed to convert their colour service into reserve service, under Army Act, s. 78 (1).

**Section D.**—Men who on the termination of their limited engagement enlist or re-engage in the Reserve for a further period of four years. They can re-engage for further periods of four years up to 42 years of age or in certain cases up to 45 years of age. **K.R., 401—414.**

The various Militia units, existing at the time the Territorial and Reserve Forces Act was passed, were

(except those units which were disbanded) converted into Special Reserve\* units, and the men belonging to them were asked at the end of their last year's training as militiamen to enlist into the Special Reserve. Those units not thus converted were disbanded.

**T. & R.F. Act, s. 34 ; A.O.**  $\frac{2}{08}, \frac{101}{08}$ .

The two regiments of Irish Yeomanry and King Edward's Horse were also transferred to the Special Reserve.

**A.O.**  $\frac{162}{08}, \frac{79}{13}$ .

The Commanding Officer of a Reservist is the Officer in charge of Records who has the custody of his documents.

**K.R. 76.**

A Militiaman who enlists into the Regular Forces is thereupon deemed to be discharged from the Reserve.

**T. & R.F. Act, s. 30 (6).**

A Reservist becomes subject to military law when called out for training, or in aid of the Civil Power, or for permanent service, and in this last case again becomes a soldier of the Regular Forces.

**ss. 176 (5), 190 (8) ; K.R., 419, 420.**

Any Reserve man who—

- (a) Fails on two consecutive occasions to comply with any order respecting the pay of the Reserve ;
- (b) When ordered to attend at any place, without reasonable excuse fails to do so ;
- (c) Uses insubordinate language, or behaves in an insubordinate manner, to any Officer or Non-Commissioned Officer acting under the Act in the execution of his office, and who would be his superior Officer if he were under military law ;
- (d) By any fraudulent means obtains, or is accessory to obtaining, any pay or other money ;
- (e) Fails without reasonable excuse to comply with orders or regulations made under the Act ;

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\* Now again called Militia. **T. A. & M. Act, s. 2.**



is liable to be tried by Court-Martial and to suffer imprisonment, or by a Court of Summary Jurisdiction and to be fined not less than 40s. or more than £25, or in default imprisonment as allowed by law.

**R.F. Act, s. 6.**

Men who without leave, except through sickness or other reasonable excuse, fail to attend when called out, are guilty of the following offences :—

- |   |   |   |
|---|---|---|
| (i.) If called out on permanent service | { | Desertion, or<br>Absence without<br>leave, as may be<br>proved. |
| or                                      |   |   |
| in aid of Civil Power                   | { | Absence with-<br>out leave.                                     |
| (ii.) If called out for annual training | { | Absence with-<br>out leave.                                     |

and are liable to be tried by Court-Martial under ss. 12 or 15 of the Army Act, and punished accordingly ; or by a Court of Summary Jurisdiction, and fined not less than 40s. or more than £25, or in default imprisonment, as allowed by law for non-payment of the fine.

**R.F. Act, s. 15.**

The law as to apprehension of absentees and deserters ; Courts of Inquiry on their illegal absence ; offences committed by civilians in assisting desertion, etc., is similar to that already described for the Regular Forces.

**R.F. Act, ss. 16, 17, 19.**

A Reservist is forbidden to make away with any military decoration granted to him, **K.R., 437**, or to quit the United Kingdom or proceed to sea without leave.

**K.R., 440 ; R.S.R., 206.**

An offender may not be tried by both a Court-Martial and a Court of Summary Jurisdiction ; and is not to be tried by the latter without the written sanction of an Officer having power to direct his trial by Court-Martial, or some superior authority. Proceedings may be instituted against him, although his reserve service has expired, and notwithstanding any limitation in any other Act, at any time within two months of his offence

becoming known to his Commanding Officer, if he is then apprehended, or if not, then within two months of his apprehension.

**R.F. Act, s. 26 and note ; K.R., 433.**

If a Non-Commissioned Officer in the Reserve is tried by Court-Martial and sentenced to imprisonment, he forfeits his rank, and if convicted by the Civil Power is liable to be reduced by the Army Council if the Officer in charge of Records thinks it desirable.

**K.R., 435.**

With respect to the notices required by the Act, it is enacted as follows :—

- (1) A notice may be served by being sent by registered post to a man's last registered place of abode.
- (2) Evidence of delivery of such letter shall be evidence that the notice was brought to his knowledge.
- (3) Publication of a notice in the prescribed manner in the parish in which his last registered place of abode is situated shall be deemed sufficient notice to him.
- (4) Constables and certain poor law officials are obliged, under penalty of a fine of twenty pounds, to assist in publishing and serving notices.

**R.F. Act, s. 24.**

## CHAPTER XXV

### THE LAW RELATING TO THE TERRITORIAL ARMY

UNDER the Territorial and Reserve Forces Act of 1907, it has become lawful for the King to maintain a Force, called the "Territorial Army," which in practice has taken the place of the Yeomanry and Volunteers, which had hitherto existed, and who (with the exception of the Irish Yeomanry, and the University and some other Volunteer Corps), were transferred to this force.

**T. & R.F. Act, s. 29 ; T.A. & M. Act, s. 1 ; A.O.  $\frac{70}{88}$ .**

For the purpose of raising and administering the Territorial Army, Associations have been formed in each county in Great Britain, whose duty it is, in conjunction with the Army Council, to recruit, organize, and equip this force, and make the necessary provision for ranges, buildings, camping grounds, etc., required.

**T. & R.F. Act, ss. 1, 2, 6.**

Men are enlisted for a county, and appointed to a unit belonging to the county ; and cannot be transferred without their consent to another corps, or posted to any body of regular forces forming part of the corps, or except when the Territorial Army is embodied to any other unit of the corps. **T. & R.F. Act, ss. 7 (4), 9 (1) ; T.F.R., 130.** The period of enlistment is for such period as may be prescribed not exceeding four years ; and in his last year of service a man may re-engage for a further period not exceeding four years ; the actual term being fixed by the County Association.

**T. & R.F. Act, s. 9 (1) ; T.F.R., 129, 139, 141 ;**

**A.O.  $\frac{280}{21}$ ,  $\frac{110}{22}$ .**

A man in the Territorial Army may enlist into the Navy, Army, or Royal Marines, and will thereupon be deemed to be discharged from the Territorial Army.

**T.F.R., 144.**

If any one enlists into the Territorial Army after having been discharged with disgrace, he can be tried by Court-Martial for the offence, and is liable to two years' imprisonment with hard labour.

**T. & R.F. Act, s. 11 (1).**

The Force is liable to serve in any part of the United Kingdom ; but men can only be sent abroad with their own consent. Men may agree to be called out for military service for home defence, whether the whole Force is embodied or not. These men form the Special Service Section.

**T. & R.F. Act, s. 13 ; T.F.R., 8.**

Officers and men are subject to Military Law under the conditions stated in Chapter III.

**ss. 175 (3A), 176 (6A).**

Men of the Territorial Army are liable to be called up—

- (i.) For preliminary training, during their first year's service, for such periods as may be prescribed ; besides attending the number of drills prescribed for a recruit.

**T. & R.F. Act, s. 14.**

- (ii.) For annual training, for not less than eight or more than fifteen (in the mounted branches eighteen) days every year ; besides attending the number of drills prescribed.

**T. & R.F. Act, s. 15.**

- (iii.) For embodiment ; whenever the Army Reserve are called out by proclamation. Whenever the Reserves have been so called out the Army Council must within one month embody all the Territorial Army, unless both Houses of Parliament petition the King that they shall not be embodied.

**T. & R.F. Act, s. 17 (1).**

Modifications in the period of annual training may be made, in the case of a unit by the General Officer Commanding, or in the case of an individual by his Commanding Officer. His Majesty may, by Order in Council, extend the annual training for the whole or any part of the Force to any period not exceeding thirty days, or may reduce it or dispense with it altogether.

**T. & R.F. Act, s. 15 (1), (2).**

The King can, by proclamation, direct that the Territorial Army be disembodied; and before such proclamation has been issued the Army Council can, if they think it expedient, disembody any part of them.

**T. & R.F. Act, s. 18.**

A man may be discharged by his Commanding Officer for disobedience when on any military duty or for misconduct; but the man has a right of appeal to the Army Council.

**T. & R.F. Act, s. 9 (4).**

Unless the Army Reserve are called out, a man can claim his discharge at any time on—

- (i.) Giving his Commanding Officer three months' notice in writing;
- (ii.) Paying to the County Association such sum, not exceeding £5, as may be prescribed; and
- (iii.) Giving up in good order his arms, clothing, and equipment, or paying their value.

**T. & R.F. Act, s. 9 (3).**

If the Army Reserve are called out at the time when a man of the Territorial Army would be entitled to be discharged, he may be required to prolong his service for such period not exceeding twelve months, as the competent Military Authority may direct.

**T. & R.F. Act, s. 9 (5).**

The competent Military Authority is defined in the Army Act, s. 101, and Rule of Procedure 128.

**T. & R.F. Act, s. 10 (1).**

Anyone who makes away with, or destroys, or refuses to deliver up on demand any equipment, clothing, etc., issued to him is liable to prosecution before a Court of Summary Jurisdiction, and to pay their value, and where he has wilfully made away with or destroyed them to pay a fine not exceeding £5 in addition.

**T. & R.F. Act, s. 22.**

Any man who, except through sickness or other reasonable excuse, fails to appear when embodied is guilty of desertion, or absence without leave, as may be proved, and is liable to be tried by Court-Martial, and punished accordingly.

**T. & R.F. Act, s. 20.**

If, similarly, he fails to attend for preliminary or annual training or the prescribed number of drills, he is liable to be tried by a Court of Summary Jurisdiction and pay a fine not exceeding £5.

**T. & R.F. Act, s. 21.**

A man guilty of desertion by failing to appear on embodiment forfeits his service between the date of his offence and the date of his apprehension or surrender; but he does not forfeit service under s. 79 for desertion under any other circumstances.

**s. 178 ; T. & R.F. Act, s. 20 (3).**

Any offence against the part of the Act dealing with the Territorial Army, and any offence under the Army Act, committed by a man of the Territorial Army, when not embodied, which is cognizable by a Court-Martial, can be dealt with by a Court of Summary Jurisdiction; and on conviction the offender is liable to imprisonment for a term not exceeding three months, or a fine not exceeding £20, or both.

**T. & R.F. Act, s. 24.**

Officers and men of the Territorial Army are exempt from serving on juries and as peace or parish officers; and Field Officers are exempt from serving as High Sheriff.

**T. & R.F. Act, s. 23 (4).**

## CHAPTER XXVI

### THE RELATION BETWEEN CIVIL AND MILITARY LAW

It has already been pointed out that Officers and soldiers, by being subject to military law, do not in any way cease to be subject to civil law, but continue to share the rights and duties of other citizens. In all cases of conflict between the civil law and the military law, the former prevails.

**s. 162 ; Dicey, pp. 276, 277 ; Clode, Vol. I, p. 206.**

Thus the Civil Courts have jurisdiction over Officers and men in the Army, and the higher Courts of Judicature have the same power of supervising the exercise of authority by Military Courts and individual Officers as they have over the inferior Civil Courts and Magistrates. Any person therefore who considers himself wronged by the action of a Court-Martial, or an Officer, can obtain redress through the ordinary process of law. A Civil Court, however, will not take cognizance of any matter affecting the purely military status of an individual, or rights or privileges of a purely military nature ; as it is held that by voluntarily subjecting himself to military law, he must accept the consequences so far as mere military rights are concerned.

**Man., VIII, 1, 2 ; Dicey, pp. 303, 304 ;  
Clode, Vol. I, p. 206.**

#### *Illustrations.*

An Officer sentenced by Court-Martial to be "Cashiered"—no action will lie.

A Non-Commissioned Officer sentenced to "Reduction to the ranks"—no action will lie.

A soldier sentenced to "Imprisonment"—an action will lie.

A soldier has his pay forfeited for absence by Royal Warrant—no action will lie.

The proceedings by which the Civil Courts supervise the actions of Courts-Martial and individual Officers may be either criminal or civil. Criminal proceedings take the form of a prosecution, or an indictment on a criminal charge; civil proceedings may be either preventive, *i.e.*, to restrain the commission or continuance of an injury, or remedial, *i.e.*, to give a remedy for an injury actually suffered.

**Man., VIII, 8.**

Preventive measures are taken by writs issuing from the High Court : (1) *A Writ of Prohibition*, forbidding the Court or Officer to whom it is addressed to proceed further in the matter; (2) a *Writ of Certiorari*, commanding the Court or Officer to certify to the High Court a record of the matter, *e.g.*, a Court-Martial sentence, in order that if illegal it may be quashed; (3) a *Writ of Habeas Corpus*, issued to anyone having another in custody, commanding him to produce his prisoner in Court and to state the authority for his detention. If the Court is not satisfied that the grounds for his detention are sufficient, they will order the prisoner to be discharged. **Man., VIII, 9, 17, 23.**

Remedial measures usually take the form of an action for damages. All the members of a Court-Martial, or an individual Officer, including the Confirming Officer and Provost Marshal who carries out the sentence, who act without jurisdiction, or in excess of their jurisdiction, are liable to an action for damages at the instance of the person injured thereby. In the case of a Court-Martial, he may bring his action against the whole Court collectively, or against any individual member; but if in the first instance he only brings his action against one or more, and obtains judgment, he cannot afterwards sue the others. **Man., VIII, 40, 42, note ; Clode, Vol. I, p. 176.**

Courts-Martial and individual Officers may expose themselves to the above-mentioned proceedings by acting without jurisdiction, or by acting in excess of their jurisdiction.



*Illustrations.*

A General Court-Martial composed of two Field Officers, one Captain, and two Subalterns would act without jurisdiction.

A District Court-Martial imprisoning a civilian witness for contempt of Court would act without jurisdiction.

A Commanding Officer punishing a camp follower on active service would act without jurisdiction.

A District Court-Martial sentencing an accused to three years' imprisonment would act in excess of their jurisdiction.

Members of Courts-Martial, like all other judicial Officers, are not held responsible for mere errors of judgment, provided they act within the bounds of their jurisdiction. The Courts are, moreover, reluctant to interfere with the exercise of military authority over persons subject to military law, provided the exercise of this authority is not carried out with oppression or cruelty ; they will also recognize the " Custom of the Service " as a justification for acts done in accordance therewith, provided the Custom be not repugnant to the law.

**Man., VIII, 3-7, 58, 63.**

It is a presumption of law that *omnia rite esse acta*, i.e., that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed the forms necessary for its validity were complied with ; and that anyone acting in an official or public capacity has been duly appointed. The Army Act expressly provides that any power or jurisdiction given to any person holding any military office may be exercised by anyone authorized either by the Custom of the Service or the Rules of Procedure to exercise this power for the time being ; and that warrants or other orders authorized to be made or issued by the Army Council or other named officials, may be issued by their Staff Officers, and shall not be invalid for mere irregularities of form. **ss. 171, 172 ; Stephen, Art. 101.**

But it has been ruled that where the Rules state that the order is to be made " under the hand " of the Officer making it, it must be signed by him and not by a Staff Officer ; and similarly, that the order convening a Field General Court-Martial must be signed by the Convening Officer himself. **R.P., 64 (B), 104.**

No action or prosecution, or other proceeding can be brought against any person in respect of any act done, or any neglect, in execution of his powers under the Army Act, unless it is commenced within six months of the alleged injury, or in case of a continuing injury (*e.g.*, imprisonment) within six months of its ceasing.

**s. 170.**

## CHAPTER XXVII

### REGULATIONS UNDER THE REGIMENTAL DEBTS ACT, 1893.

ON the death of a person subject to Military Law, a Committee of Adjustment will, as soon as possible, secure and make an inventory of all his personal effects, in camp or quarters at home, or within the Station or Command abroad ; and will ascertain and pay all the preferential charges on his property. Medals and decorations are not included in the personal estate, but will be dealt with as provided by Royal Warrant.

**R.D. Act, ss. 1, 11 ; R.D. Reg., 30A ; A.O.  $\frac{180}{17}$ .**

The Committee of Adjustment will consist of three Officers, the President, if possible, not to be below the rank of Captain, or if the deceased was an officer, below that of Major. It will be appointed by the following Officers :—

- (a) If deceased was serving with his unit, by the Commanding Officer.
- (b) If the death occurred at sea, by the Officer Commanding the troops on board.
- (c) In other cases, by the Officer in immediate command.

**R.D. Reg., 1, 2.**

By the term “ preferential charges ” are meant any of the following liabilities, which are payable in preference to all other debts in the order stated :—

- (1) Expenses of last illness and funeral.
- (2) Sums due in respect of—
  - (a) Quarters.
  - (b) Mess, band, or other regimental accounts.
  - (c) Military clothing or appointments, not exceeding a sum equal to six months' pay, and having become due within eighteen months of his death.

And abroad :

(3) Servants' wages, not exceeding two months each.

(4) Household expenses, incurred within a month of death, or last issue of pay.

**R.D. Act, s. 2.**

If the widow or one of the next-of-kin, or their representative, pays or secures the preferential charges, the Committee of Adjustment shall not interfere further. If these charges are not paid within a month after the death, they will proceed to pay them.

**R.D. Act, ss. 5, 6 ; R.D. Reg., 12.**

Only the balance, after paying these charges, is liable to probate duty, and when this surplus does not exceed £100, no duty is payable. **R.D. Act, ss. 3, 16.**

When a man deserts, is absent twenty-one days, is convicted of felony by the Civil Power, or is delivered up as an apprentice, a similar Committee of Adjustment is appointed to dispose of his effects, which are sold and the proceeds credited to his Non-effective Account. Any balance may be paid to the apprentice ; or a deserter or absentee who rejoins within a year ; or to the man convicted of felony after he has undergone his sentence.

**R.D. Act, s. 23 ; R.D. Reg., 36-47.**

In the case of a person subject to military law becoming insane, a similar course is adopted, and the balance applied for the benefit of the insane person.

**R.D. Act, s. 24 ; R.D. Reg., 49-51.**

When any surplus remains undisposed of, a notice is published annually for the next six years in the *London Gazette* ; and if not claimed within six months after the last notice, is applied for the benefit of widows and children of men dying on service.

**R.D. Act, s. 10 ; R.D. Reg., 30 ; Man., pp. 797, 798.**



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